IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

JURISDICTIONAL STATEMENT

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I N D E X

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes

Other Authorities

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1977

NO.

TERRY T. TORRES,

Appellant,

vs.

COMMONWEALTH OF PUERTO RICO,

Appellee.

JURISDICTIONAL STATEMENT

Appellant, Terry T. Torres, appeals from the final Judgment of the Supreme Court of Puerto Rico, entered on December 14, 1977, affirming his conviction for possession of marihuana.

OPINIONS BELOW

The opinion of the Supreme Court of Puerto Rico was originally rendered in the Spanish language and is as yet unreported. A true copy of the official English translation by the Supreme Court of Puerto Rico is reproduced as Appendix A. The English translation of the Judgment of the Supreme Court of Puerto Rico affirming petitioner's conviction is reproduced as Appendix B.

The opinion of the Superior Court of the Commonwealth of Puerto Rico, San Juan Part, was originally rendered in the Spanish language and is unreported. An official English translation of that opinion was prepared by the Supreme Court of Puerto Rico and is reproduced as Appendix C.

JURISDICTION

In the criminal trial below, appellant challenged the validity of Public Law No. 22, 25 L.P.R.A. §§ 1051-1054, a statute of the Commonwealth of Puerto Rico, on the grounds that it is repugnant to the Constitution and laws of the United States. On December 14, 1977, the Supreme Court of Puerto Rico affirmed appellant's conviction

and sustained the validity of that law. The notice of appeal was filed on December 21, 1977. An amended notice of appeal was filed on January 11, 1978. On March 1, 1978, Mr. Justice William J. Brennan, Jr. issued his Order extending to and including May 13, 1978, the time to file a jurisdictional statement and/or to petition for certiorari. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1258(2) and (3). Fornaris v. Ridge Tool Co., 400 U.S. 41 at p. 42, fn. 1 (1970) (dicta), sustains this Court's appellate jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The validity of Public Law No. 22 of August 6, 1975, 25 L.P.R.A. §§ 1051-1954 and of Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico are challenged herein. The operative part of Public Law 22 is set forth below:

> The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying

firearms, explosives, narcotics, depressants or stimulants or similar substances.

25 L.P.R.A. § 1051 (West 1975).

Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico (48 U.S.C. § 731d) provides as follows:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

The other constitutional and statutory provisions involved and the full text of Public Law No. 22 are set forth in Appendix F.

QUESTIONS PRESENTED

1. Whether Puerto Rico may constitutionally enact a law that authorizes the indiscriminate, warrantless search and seizure, without probable cause, of persons and property arriving in Puerto Rico from other parts

of the United States.

2. Whether Puerto Rico constitutionally may create a "de facto" international border between itself and other parts of the United States?

3. Whether Public Law No. 22, 25 L.P.R.A. §§ 1051-1054, unlawfully abridges the right to travel by subjecting individuals to indiscriminate, warrantless searches without probable cause upon their entry into the Commonwealth of Puerto Rico from other parts of the United States?

4. Whether Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico operated to deny appellant his right to due process of law by precluding the Supreme Court of Puerto Rico from reversing appellant's conviction for possession of marihuana, even though a majority of the justices who heard the case were convinced that the conviction was obtained in violation of the Fourth Amendment to the United States Constitution?

STATEMENT OF THE CASE

On August 6, 1976, appellant arrived at Puerto Rico's Isla Verde Airport aboard Eastern Airlines' Flight 915, non-stop from Miami, and went to

the baggage claim area to pick up his luggage. The trial court found that he "looked nervous, following with his eyes the movements of Police Agent Ruben Marcano, who was fully uniformed at his station of surveillance of passengers arriving from the United States." Opinion of the Honorable Charles E. Figueroa, Judge of the Superior Court (App. C at p. 103). A second agent, Marcelino Santiago of the Division for the Search and Patrol of Ports and Airports of the Criminal Investigations Bureau of the Police of Puerto Rico, noticed that appellant appeared nervous. Agent Santiago was in plain clothes. Id.

As appellant was leaving the baggage area with his luggage, agents Santiago and Marcano approached appellant , identified themselves and presented a card describing their authority pursuant to Act No. 22 of August 6, 1975, 25 L.P.R.A. §§ 1051-1054 [hereinafter "Public Law 22"], the operative section of which provides:

> "Authorization to Inspect
>
> "The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to

> examine cargo brought into the country, and to detain, question, and search those persons whom the police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances."

Appellant objected to any search of his luggage and insisted on calling his uncle, an attorney in Puerto Rico. Agent Marcano told him he would be entitled to call an attorney if he had committed an offense, but made clear to him that this "was only a routine baggage seach, like that of all passengers inspected pursuant to Act No. 22 of August 6, 1975." (App. C at pp. 104-105.)

The officers searched appellant's luggage and in one of the suitcases they found a paper bag containing approximately one ounce of marihuana and a pipe containing marihuana residues. (App. C at p. 105.) Appellant was arrested and charged with a violation of Article 404 of the Controlled Substance Act of Puerto Rico. On August 31, 1976, the prosecuting attorney filed an information charging that appellant "unlawfully, willfully, maliciously, knowingly and/or intentionally, carried the controlled substance marihuana, ..." Information, August 31, 1976.1/

1/ The trial and all proceedings below were
(continued on next page)

Prior to trial, appellant moved to suppress the marihuana and pipe on the grounds that the evidence was obtained in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, of various Puerto Rico statutory and constitutional provisions and "[i]n violation of the case la.. established by the Supreme Court of Puerto Rico and by the Supreme Court of the United States of America." Motion to Suppress Evidence, Superior Court No. G 76-3105 (undated). The Court heard testimony on October 26, 1976. Appellant filed a post-hearing memorandum of authorities dated November 1, 1976, arguing the unconstitutionality of Public Law 22 under federal and Puerto Rico law.

On December 22, 1976, the Superior Court issued its Resolution and Order (Appendix C) denying the motion to suppress evidence. The court found

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1/ (footnote continued) conducted in the Spanish language. Pursuant to appellant's request, an English translation of the record in the Supreme Court of Puerto Rico was prepared and, we are advised, lodged with this Court. The pages of the translation are not numbered serially and will be referred to by description of the document and by the page number within the document as translated. The parts of the record reproduced in the appendices will be identified by their page number in the appendix. Appellant speaks Spanish.

that appellant's luggage was searched because he appeared "nervous" as he was "about to leave the baggage claim area," and that the inspection was based on Public Law 22. The Court also adopted as findings the testimony of agent Marcano as follows:

> "Agent Marcano also stated that, at the Isla Verde Airport there are warnings informing arriving passengers that their luggage may be inspected under Act No. 22 of August 6, 1975, and that there are no similar warnings in the airplanes and that he thinks, although he cannot categorically assert it, that there are no warnings regarding the effectiveness and scope of Act No. 22 of August, 1975 in the airports from where the airplanes depart on their domestic flights. That his intervention was partly due to the defendant's conduct and to the way he was dressed, but was rather based on the authority granted by Act No. 22 of August, 1975 and that the defendant was not a suspect."
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> (App. C at pp. 105-106)

Notwithstanding the "persons and effects language of the Fourth Amendment, the Court held that "the reasonable grounds [sic] requirement only has to be met when the agent intends to detain and eventually

search the passenger, not his luggage." 2 / (App. C at p. 108; emphasis added.)

The trial court held that:

> " [D]efendant's conduct, as observed by agent Marcano, and the information received from agent Santiago, do not constitute, in our judgment, the reasonable and supported grounds required of a law enforcement officer to justify, ordinarily, the arrest of a citizen in accordance with our case law, but we can consider it suspicious conduct that could justify a border search, in accordance with some cases in the federal case law."
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> (App. C at pp. 108-109)

The trial court then upheld that warrantless search without probable cause on the authority of "border" searches.

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2 / As the Court noted, the United States carries out only "sporadic inspections through the U. S. Department of Agriculture when checking for tropical fruit and plants which may be harmful to public health and agriculture." (App. C at p. 112) These inspections, however, are pre-boarding agricultural inspections for persons leaving the island.

(App. C at pp. 110-115.) The trial court recognized "a serious problem with the traffic and smuggling of narcotics, firearms and explosives on the part of individuals who travel freely between Puerto Rico and the United States" (App. C at p. 112), and that no customs or other inspection facilities are set up to inspect travelers between Puerto Rico and the United States, since Puerto Rico is part of the United States (App. C at p. 112). The court held that the border search doctrine should apply:

> [B]ecause of the peculiar condition of our island, the unrestricted ease with which American citizens travel from any point in the United States to Puerto Rico, and vice versa, the frequency with which domestic flights arrive at and depart from our airport, and also because the inspection carried out under [Public Law 22] is not covered by the federal government. 3/
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> (App. C at p. 115.)

The trial court sitting without a jury admitted the evidence, convicted appellant, and, on January 7, 1977, sentenced him to one to three years' imprisonment.

3/ Puerto Rico shares these characteristics not only with the Hawaiian Islands but with Manhattan Island as well.

Appellant's motion for bail pending appeal was granted.

On appeal to the Puerto Rico Supreme Court, appellant raised the following "errors and questions":

> a) The honorable trial court erred in not granting the motion for suppression of evidence.
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> b) The honorable trial court erred in determining that under Act No. 22 of August 6, 1975, "reasonable grounds" are not needed for an agent to stop a person.
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> c) The honorable trial court erred in not declaring unconstitutional Act No. 22 of August 6, 1975, because it contravenes the Fourth Amendment of the Constitution of the United States and Article II, Section 10 of the Constitution of the Commonwealth of Puerto Rico.
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> Appellant's Brief at pp. 3-4.

In addition to the Fourth Amendment issue, appellant also argued that Public Law 22 violated his federal constitutional right to travel emanating from Article 1, § 9 (the commerce clause) and from the privileges and immunities clause of the Fourteenth Amendment. Id., at p. 7.

On December 14, 1977, the Supreme Court of Puerto Rico issued its Judgment (App. B) and four separate opinions (App. A). Although a majority of the Justices who heard the case believed Public Law 22 to be unconstitutional, (App. B) the judgment below was affirmed on the basis of Article 5 § 4 of the Constitution of the Commonwealth of Puerto Rico (48 U.S.C. § 731d). Article 5 § 4 provides:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.
>
> (Emphasis added.)

The Supreme Court of Puerto Rico is now composed of eight members. Mr. Justice Rigau did not participate in the decision. No reason was given for his failure to do so. (App. B) Although four of the seven members who actually heard the case believed that Public Law 22 violated the Fourth Amendment, appellant's conviction was upheld. In short, the court believes Public Law 22 violates the Fourth Amendment, but feels bound not to issue a judgment to that effect. The

law and appellant's conviction still stand.

Although the majority was powerless to declare Public Law 22 unconstitutional it did provide an authoritative construction of the statute. Writing for the majority, Mr. Justice Yunque first noted that the law authorized "indiscriminate" searches. (App. A at p. 3). He went on to determine that consistent with the stated "motives" of Public Law 22, the law was "directed at seeking 'firearms, explosives, narcotic substances, depressants or stimulants or similar substances'...with the purpose of instituting criminal prosecutions. . . ." (App. A at p. 13; emphasis added.) Thus the Court properly distinguished the law from administrative search cases, which in any event require a search warrant. See Camara v. Municipal Court, 387 U.S. 523 (1967).

Finally, the majority rejected the lower court's interpretation that the statute was directly solely towards "objects" or luggage.

> The searches authorized by said statute do not have the exclusive purpose of seizing objects. The facts of this case demonstrate this. Appellant was stopped, accused, tried and convicted as a result of the search of his luggage conducted pursuant to said act. The police power of the state is not synonymous to the power of the police to stop persons and search them without reasonable grounds. The latter is what Act No. 22 authorizes against the clear constitutional provisions which forbid it.
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> (App. A at p. 30; emphasis added.)

The majority of the members of Puerto Rico Supreme Court who heard the case has interpreted Public Law 22 to be exactly what it appears to be: a law purporting to allow police officers in pursuit of criminal activity to conduct "indiscriminate" warrantless searches of the "persons...papers and effects" of persons who are not even reasonably suspected of engaging in criminal activity.

The majority also held that the particular search herein was in fact "indiscriminate" and that there is "no controversy in that the detention and the search of appellant's belongings were carried out without reasonable grounds to believe that he was acting contrary to law." (App. A at p.3.)

The majority then rejected the border search argument as inapplicable because Public Law 22 "deals with the entry of persons and articles from the United States" and under such circumstances, "our borders are state borders." (App. A at p. 5.) Mr. Justice

Yunque noted that "[s]tates have not been authorized to stop all those who trespass its borders and search them without reasonable grounds to do so." (App. A at p. 6.) He rejected the view that Puerto Rico's island status makes it any different from the states for Fourth Amendment purposes, since most people travel to Puerto Rico by plane, and it is "irrelevant whether the surface flown over is island or sea ....When traveling by plane, there is no difference between going from here to Miami or from Miami to New York." (App. A at p. 21)

The majority also rejected the argument that the compact between the United States and Puerto Rico gives it the right to "consider the United States as a foreign country...."

> The special relationship between Puerto Rico and the United States, based on the existence of a compact--Public Law 600, 81st Cong., 1 L.P.R.A., Vol. 1, pp. 136-138--does not empower us to consider the United States as a foreign country and to subject all persons arriving at Puerto Rico from the United States to an indiscriminate search of their persons and their belongings, without a search warrant and without probable cause or reasonable grounds. The Commonwealth is not an associate republic. Far from

> that, it is a political condition adopted by us in Puerto Rico based on, among other fundamental principles, our union with the United States....
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> (App. A at pp. 19-20.)

Three additional opinions were filed by Justices who concurred with the affirmance of the judgment, but who believed the Act to be unconstitutional.

Mr. Justice Cruz would have found Public Law 22 constitutional as a border search. (App. A at pp. 39-50.) Mr. Justice Cruz characterized the search as an "inspection," an exception to the Fourth Amendment that would in this case swallow the entire rule. Mr. Justice Cruz further argued that Puerto Rico is a "unique entity" (App. A at p. 44), which is more vulnerable than the states to illegal smugglers. He would, therefore, create a "de facto border for 'domestic' travelers which requires as much surveillance as United States international borders." (App. A at p. 45.) Citing Miller v. California, 413 U.S. 15 (1973), he joined Mr. Justice Garcia in suggesting that the Court create a "community standards" approach to the Fourth Amendment. (App. A at pp. 46-48.) Finally, in apparent reference to the novelty of these views, Mr. Justice Cruz argued that the majority should not lock itself in the "conceptual prison of stare decisis." (App. A at p. 55.)

Mr. Justice Martin also favored a "community standards" approach to the Fourth Amendment, and stated his view that "the protection against unreasonable searches should be safeguarded but not when it affects the community." (App. A at pp. 65-67.)

Norwithstanding the fact the appellant was already off the aircraft, Mr. Justice Garcia would have upheld the search as an "airport search". (App. A at pp. 73-75.) He also argued that the search was valid as an administrative inspection (App. A at pp. 75-85). Finally, he would grant to Puerto Rico "prerogative and powers that the federal constitution denies to the states of the Union." (App. A at p. 85.) Citing the special tax arrangement granted Puerto Rico, he argued that Puerto Rico is to be distinguished from the states because the states "cannot escape the application of federal laws because they are part of the supreme law of the nation." (App. A at p. 86) This distinction, he argued, gives Puerto Rico "a power that is analogous to that of federal customs agents at the nation's borders." (App. A at p. 87.)

On December 21, 1977, appellant filed a timely Notice of Appeal and a request for a stay of mandate pending appeal to this Court. The stay was

granted on January 4, 1978.[4/] On January 11, 1978, appellant filed an Amended Notice of Appeal in conformance with Rule 10 of the Rules of this Court. Both notices of appeal raised the Fourth Amendment issues. They further argued that it was a denial of due process to uphold appellant's conviction when a majority of the members of the Puerto Rico Supreme Court who heard the case believed it to be unconstitutional. Because this issue appeared for the first time after the judgment of the Puerto Rico Supreme Court, it could not have been raised before.

In his Notice of Appeal and in a separate request dated January 12, 1978, appellant asked that the record before the Puerto Rico Supreme Court be translated and sent to this Court. On March 1, 1978, Mr. Justice William J. Brennan, Jr. extended the time to file this jurisdictional statement to and including May 13, 1978, because the record had not yet been translated. On April 5, 1978, the Clerk of the Supreme Court of Puerto Rico forwarded a copy of the translated record to counsel.

4/ The translation of the Resolution dated January 4, 1978, incorrectly omitted the Court's order by translating the words "it is so granted" as "the Court provides as follows." Since the parties do not contest his status, appellant has not asked for a correction.

On April 14, 1978, appellant filed an untimely motion for reconsideration in the Supreme Court of Puerto Rico. The motion alleged that an opera star had recently been searched pursuant to Public Law 22, that the search had generated much publicity and that a newspaper reported that Mr. Justice Rigau had stated that he is now prepared to vote on the constitutionality of Public Law 22. The motion asked that the Court allow Mr. Justice Rigau to vote and that it reconsider its interpretation of Article 5 § 4 of the Puerto Rico Constitution. On May 4, 1978, the motion was denied.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case presents substantial federal questions with profound implications for the relationship between the United States and the Commonwealth of Puerto Rico and for Fourth Amendment jurisprudence.

A. Public Law No. 22 unconstitutionally authorizes the "indiscriminate" warrantless search and seizure of persons and property entering Puerto Rico from other parts of the United States.

Public Law 22 provides blanket authorization for police to "inspect the luggage, packages, bundles, and

bags of passengers" entering Puerto Rico from the United States. It further empowers police to "detain, question and search those persons whom the police have ground to suspect of illegally carrying firearms, explosives, narcotic substances . . . stimulants or similar substances." 5/

The Supreme Court of Puerto Rico has left no doubt that Public Law 22 authorizes "indiscriminate" warrantless searches, "without reasonable grounds", of persons as well as property, for the purpose of instituting criminal prosecutions". (App. A at pp. 3, 22, 13.)

5/ The "ground to suspect" which permits detention of individuals does not rise to the level of probable cause. It is not even the reasonable suspicion justifying a stop under Sibron v. New York, 392 U.S. 40 (1968). That suspicion must consist of "specific and articulable facts which,... 'warrant a man of reasonable caution in the belief' that the action taken [is] appropriate." Terry v. Ohio, 392 U.S. 1, 21-22 (1968). Public Law 22 requires no such articulable facts, nor are they present here. And most importantly, the stop and frisk cases would have limited the police to routine questions and possibly a "pat down" search. The luggage search here would be wholly impermissible.

The foregoing construction[6/] unmistakably demonstrates the conflict between Public Law 22 and the Fourth Amendment.

This Court has consistently condemned warrantless searches and seizures. Chimel v. California, 395 U.S. 752, 762 (1969); Camara v. Municipal Court, 387 U.S. 523, 528-28 (1967). The prohibition of warrantless searches is subject to but a few "jealously and carefully drawn" exceptions. Jones v. United States, 357 U.S. 493, 499 (1958). Those exceptions fall into three general categories: certain searches conducted where speed is essential and obtaining a warrant is impracticable, consent searches, and a very limited class of routine searches. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 349, 358-60 (1974).

No one has suggested that the police had no time in this case to obtain a search warrant. United States v. Chadwick, ___ U.S. ___, 97 S.Ct. 2476 (1977). Similarly, no one has argued, nor do the facts support a finding, that appellant voluntarily

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6/ This Court has held that "a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong.'" Fornaris v. Ridge Tool Co., 400 U.S. 41, 43 (1970)(per curiam), citing Bonet v. Texas, 308 U.S. 463 (1940).

consented to a search. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See, United States v. Robson, 477 F.2d 13 (9th Cir. 1973).

The class of routine searches permitted without a warrant is extremely limited. This court has allowed searches of persons and objects entering the United States across an international border, Almeida-Sanchez v. United States, 413 U.S. 266 (1973); searches of certain premises licensed for sale of firearms and liquor, United States v Biswell, 406 U.S. 311 (1972); and inventory searches of vehicles properly taken into police custody. South Dakota v. Opperman, 428 U.S. 364 (1976).

Since the search authorized by Public Law 22 is so clearly unconstitutional under any present theory, the minority justices below turned to the border search doctrine to justify its continued validity. (App. A at pp. 45, 75-85). We agree that the search permitted by the statute is so broad and inclusive and so subject to the whim of the police officer that it can only be equated to a border search. The problem, however, is that there is no border. As the United States District Court for the District of Puerto Rico has succinctly stated in a related context, "[t]he basic requirement for a Customs' border search is a border." United States v. Ferrone, 413 F.Supp. 408, 409 (1975); see, Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

Determination of the status of Puerto Rico is a continuing hotly debated issue within the Commonwealth. That determination, however, is for the people of Puerto Rico and the Congress of the United States. Puerto Rico's status cannot be decided by the courts on an ad hoc basis. For the present Puerto Rico is entitled to no more--and probably no less--autonomy than the states, since "the purposes of Congress in the 1950 and 1952 [enabling] legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with states of the Union . . . ." Examining Board v. Flores de Otero, 426 U.S. 572, 584 (1976); see, Calero-Toledo v. Pearson Yacht Co., 416 U.S. 663, 669-76 (1974).

By affirming the judgment below this Court would effectively adopt Mr. Justice Cruz's position that the courts may create a "de facto border for 'domestic' matters which requires as much surveillance as United States international borders." (App. A at p. 45.) That, in principle, is no difference from allowing the New York police to pick and choose whom they will search on a whim at the city's airports, docks, bus stations and bridges. Indeed every state, city and town in this country has some claim to uniqueness and may be expected to claim its own right to conduct "border searches." The issue is indeed substantial.

B. The Provision of the Puerto Rico Constitution Requiring a Majority Vote of the Total Number of Justices of the Puerto Rico Supreme Court Before a Statute May Be Declared Invalid is Unconstitutional as Applied in This Case.

Article V, Section 4 of the Constitution of Puerto Rico provides that

> [n]o law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

On its face, the provision is neither unconstitutional nor even unusual. However, in the instant case, the provision was applied in a criminal proceeding in which one of the eight justices was absent and four of the remaining seven were of the opinion that the conviction was obtained pursuant to an unconstitutional statute. Application of the majority rule provision in the only appellate procedure available to appellant violates the due process clause of the United States Constitution.7/

7/ This Court has determined that federal principles of due process govern proceedings in the courts of Puerto Rico. However, it has not yet determined whether it is the Fifth or the Fourteenth Amendment which makes

(continued on next page)

It is well settled that once a state or territory grants a right of appeal to criminal defendants, federal due process requirements govern the appellate procedure. Douglas v. California, 372 U.S. 353, reh. denied, 373 U.S. 905 (1963). See Ross v. Moffitt, 417 U.S. 600 (1974).

Puerto Rico law provides for appeal from a criminal conviction. In exercising that right of appeal appellant could not be denied a transcript of the trial court proceedings because of an inability to pay. Griffin v. Illinois, 351 U.S. 12 (1956) Nor could he be denied the right to counsel on appeal, Douglas v. California, 372 U.S. 353 (1963), nor made to pay a filing fee. Burns v. Ohio, 360 U.S. 252 (1959). Yet if this application of Article V, Section 4 is allowed to stand the appellant will have been convicted pursuant to a law which a majority of the Justices sitting were convinced is unconstitutional. When the outcome of a criminal case depends not on a principled application of the requirements of the Fourth Amendment but on the chance mathematics of the number of Justices available to hear

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7/ (footnote continued) those principles applicable. Examining Board v. Flores de Otero, 426 U.S. 572, 601 (1976). But see, Justice Rehnquist's partial dissent 426 U.S. 572, 606-09.

the case, a criminal defendant has been denied due process of law, and his conviction should be reversed.

Ohio ex rel Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930) does not compel a different result. That case upheld a provision of the Ohio Constitution which prevented the Ohio Supreme Court from declaring a statute unconstitutional unless all but one of the judges agreed or unless the decision affirmed a similar judgment by a state court of appeals.

Unlike the instant case, Ohio ex rel Bryant involved a civil suit. The Court disposed of the due process issue in a single paragraph, emphasizing that plaintiffs had been afforded ample opportunity "to contest all constitutional and other questions fully in the common pleas court and again in the court of appeals...." 281 U.S. at 80. Appellant was provided no such opportunity here. In the nearly fifty years since Ohio ex rel Bryant the concept of due process has changed so dramatically that the principles on which the Court relied in that case are no longer applicable. In that period of time, for example, criminal defendants in state courts have been guaranteed the right to trial by jury, Duncan v. Louisiana, 391 U.S. 145 (1968); to be free of compelled self-incrimination; Malloy v. Hogan, 378 U.S. 1 (1964); to a speedy and public trial, Klopfer v. North Carolina, 386 U.S.

213 (1967) and In re Oliver, 333 U.S. 257 (1948); to the protection of the exclusionary rule against evidence illegally obtained, Mapp v. Ohio, 367 U.S. 643 (1961); and to the assistance of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963).

Appellant was denied his right to due process of law. The federal question is substantial.

C. The Appropriateness of Plenary Consideration.

Appellant believes that the Fourth Amendment violation is clear and that the opinion--but not the judgment--of the majority below is correct. It should also be clear that notwithstanding Article V, § 4, the Puerto Rico Supreme Court can and will enter a judgment that Public Law 22 is unconstitutional if this Court vacates and remands. We therefore do not believe that plenary consideration is necessary. Since the majority below agrees the statute is unconstitutional, an order of this Court summarily vacating and remanding would hardly be precipitous.

In the event the Court does not decide to summarily reverse,the case should be set for plenary consideration. Affirming the judgment or dismissing the appeal will have enormous impact on Fourth Amendment law, on relations between Puerto Rico and the

United States and on the physical integrity of the hundreds of thousands of persons who use the airports of Puerto Rico. At a minimum, plenary consideration is required.

If this Court does not wish to consider the Fourth Amendment issue, it may nonetheless vacate and remand on the due process issue and we urge it to do so. Plenary consideration may be appropriate, however, since Article V, § 4 of the Puerto Rico Constitution effectively insulates local laws from federal constitutional attack and since the Court has not considered a similar question since Ohio ex rel Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930).

CONCLUSION

For the aforementioned reasons this Court should note probable jurisdiction and either vacate the opinion below and remand for reversal of appellant's conviction or set the case for plenary consideration of the substantial federal questions.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,	Judgment of the Superior Court,
Plaintiff and appellee	San Juan Part, Charles E.
v.	Figueroa, Judge
Terry Terrol Torres Lozada,	No. Cr-77-24
Defendant and appellant	Article 404, Controlled Substances Act

Opinion delivered by MR. JUSTICE IRIZARRY YUNQUE, with whom MR. CHIEF JUSTICE TRIAS MONGE, MR. JUSTICE DAVILA, and MR. JUSTICE TORRES RIGUAL join.

San Juan, Puerto Rico, December 14, 1977

On August 6, 1976, appellant landed at Isla Verde International Airport on a commercial flight from Miami, Florida. Once he picked up his suitcases and was ready to leave the baggage claim area, two agents from the Puerto Rico Police Department approached him, identified themselves and presented an informative card on Act No. 22 of August 6, 1975, whose sec. 1, 25 L.P.R.A. § 1051 provides:

"Authorization to Inspect

"The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances."

The agents asked appellant to accompany them with his luggage to the Criminal Investigations Bureau's offices at the air terminal. There they practiced a "routine checkup" of his luggage, and in one of the suitcases they found and seized a paper bag containing cut marihuana and a pipe containing residues of said substance. He was arrested, accused, and convicted of a violation of art. 404 of the Controlled Substances Act, 24 L.P.R.A. § 2404.

At the trial court appellant unsuccessfully alleged that the substance and pipe seized were not admissible because they were the product of an unreasonable search and that the Act cited is repugnant to the Fourth Amendment of the Federal Constitution and to Sec. 10 of Art. II of the Constitution of the Commonwealth of Puerto Rico. Appellant was convicted and sentenced to serve from 1 to 3 years in prison; feeling aggrieved he raised the foregoing allegations before this Court. There

is no controversy in that the detention and the search of appellant's belongings were carried out without reasonable grounds to believe that he was acting contrary to law. Under such circumstances the search was illegal and the evidence seized inadmissible in the criminal prosecution brought against him. As to the provision allowing indiscriminate searches such as the one carried out, we deem that it is unconstitutional.

The trial court sustained the legality of appellant's search on the doctrine of border searches adopted by the Supreme Court of the United States. Said doctrine cannot be accepted as an authority to justify a search as the one under our consideration carried out in open violation of the Fourth Amendment of the Constitution of the United States and of Art. II, Sec. 10 of the Constitution of the Commonwealth of Puerto Rico.

The federal doctrine that permits border searches, which by the way, has not been exempt from criticism,[1] obviates the

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[1] See Border Searches and the Fourth Amendment, commentary in 77 Yale L.J. 1007 (1967-68), Search and Seizure at the Border--The Border Search, 21 Rutgers L. Rev. 513 (1967) and Intrusive Border Searches--Is Judicial Control Desirable?, 115 U. Pa. L. Rev. 276 (1966).

reasonability requirement of the Fourth Amendment on the grounds that no person traveling to the United States from a foreign country has a right to enter the country without identifying himself or allowing inspection of his belongings. To that effect, Almeida-Sánchez v. United States, 413 U.S. 266, 262 (1972) states:

> "It is undoubtedly within the power of the Federal Government to exclude aliens from the country. Chae Chan Ping v. United States, 130 U.S. 581, 603-604. It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders. As the court stated in Carroll v. United States: 'Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in.'" 267 U.S. at 154. See also Boyd v. United States, 116 U.S. 616.

The entry into Puerto Rico of people from foreign countries is regulated by federal custom and immigration statutes.[2]

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[2] Immigration and Nationality Act, 8 U.S.C. § 1101-1503.

To those effects, our borders are borders of the United States.[3] On the other hand, when the question under consideration deals with the entry of persons and articles from the United States, our borders are state borders. Once in the United States, any person has a right to travel from one end to the other and across state borders without being bothered (free passage without interrupation, according to Carroll v. United States, 267 U.S. 132, 154, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). It is a right which has been granted constitutional rank and cannot be unreasonably affected by local regulations. Shapiro v. Thompson, 394 U.S. 618 (1969); United States v.

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[3] 8 U.S.C. § 1101(36), (38), which define "State" and "United States" as follows:

> "(36) The term 'State' includes (except as used in section 1421(a) of this title) the District of Columbia, Puerto Rico, Guam, and the Birgin Islands of the United States."

> "(38) The term 'United States', except as otherwise specifically herein provided, when used in geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States. For the purpose of issuing certificates of citizenship to persons who are citizens of the United States, the term 'United States' as used in section 1452 of this title includes the Canal Zone."

Guest, 383 U.S. 745 (1966). States have not been authorized to stop all those who trespass its borders and search them without reasonable grounds to do so. Said exception to the Fourth Amendment has not been established.[4]

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[4]For the purposes of the probable cause requirement to carry out a search, this distinction between persons entering the United States and those moving within the United States is also embodied in the Federal Plant Pest Act, 71 Stat. 31-34, 7 U.S.C. § 150aa-150-gg, to wit:

"Sec. 150aa. Definitions

"(e) 'United States' means any of the States, Territories or Districts (including possessions and the District of Columbia) of the United States.

"(f) 'Interstate' means from one State, Territory or District (including possessions and the District of Columbia) of the United States into or through any other such State, Territory or District."

Sec. 150ff. Inspections and seizures, warrants

"Any properly identified employee of the Department of Agriculture shall have authority to stop and inspect, without a warrant, any persons or means of conveyance moving into the United States, and any plant pests and any products and articles of any

In fact, in Almeida-Sánchez, supra, the conviction of a Mexican citizen who crossed the border of the United States and who carried a great quantity of marihuana in his vehicle in violation of 21 U.S.C. § 176a (1964 ed.) was reversed because the search of the vehicle was not carried out at the border. The search was effected 20 miles from the border by a federal border patrol under sec. 287(a)(3) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357(a)(3), which authorizes the search of automobiles and other means of transportation "within a

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footnote 4 continued

character whatsoever carried thereby, to determine whether such persons or means of conveyance are carrying any plant pests contrary to this chapter and whether any such means of conveyance, products or articles are infested or infected by or contain any plant pest or are moving in violation of any such regulation under this chapter; to stop and inspect, without a warrant, any persons or means of conveyance moving interstate, and any plant pests and any products or articles of any character whatsoever carried thereby upon probable cause to believe that such means of conveyance, products, or articles are infested or infected by or contain any plant pest or are moving subject to any regulations under this chapter, or that such persons or means of conveyance are carrying any plant pest subject to this chapter . . ."

reasonable distance from any outside border of the United States," according to regulations to be promulgated by the Attorney General. The regulation thus adopted, 6 C.F.R. § 287.1, defines "reasonable distance" as "within 100 air miles from any external boundary of the United States." The court said at pages 272-273:

> "Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.
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> "But the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border, was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures.' "

In United States v. Schafer, 461 F.2d 856 (9th Cir. 1972) we do not find the precedent to sustain the validity of an interstate search nor that of a statute as the one under our consideration. The Act cited in Schafer is a federal law. Said Act authorizes the Secretary of Agriculture to quarantine any state or territory if he determines that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation and in said case to put up notices to inform the public of said quarantine. 7 U.S.C. § 161.

Once a quarantine is ordered and reported, the law clearly authorizes any properly identified employee of the Department of Agriculture designated by the Secretary of Agriculture to enforce the provisions of the law, upon having probable cause to believe that any person, vehicle or vessel, coming from a foreign country or moving interstate carries plants or products prohibited by said law or by a quarantine, to stop the person without a search warrant and to seize and destroy said plants and products, 7 U.S.C. § 164a.[5] Said law does not authorize the

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[5] The complete text reads as follows:

> "Any employee of the Department of Agriculture, authorized by the Secretary of Agriculture to enforce the provisions of this chapter and furnished with and wearing a suitable badge for identification, who has probable cause to believe that any person coming into the United States, or any vehicle, re-

frivolous search of persons.

Under the aforementioned Act, the Secretary of Agriculture quarantined the State of Hawaii. When Mrs. Schafer was about to board a plane in Hawaii headed for the mainland, a federal Agriculture employee--a quarantine inspector--found a grasslike substance in her bag which seemed to be marihuana; he called a local policeman who identified the substance as marihuana and arrested Mrs. Schafer. After conducting a more thorough search some LSD tablets were found in her bag and in her

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footnote 5 continued

"ceptacle, boat, ship, or vessel, coming from any country or countries or moving interstate, possesses, carries, or contains any nursery stock, plants, plant products, or other articles the entry or movement of which in interstate or foreign commerce is prohibited or restricted by the provisions of this chapter, or by any quarantine or order of the Secretary of Agriculture issued or promulgated pursuant thereto, shall have power to stop and, without warrant, to inspect, search, and examine such person, vehicle, receptacle, boat, ship, or vessel, and to seize, destroy, or otherwise dispose of, such nursery stock, plants, plant products, or other articles found to be moving or to have been moved in interstate commerce or to have been brought into the United States in violation of this chapter or of such quarantine or order." (Underscore supplied).

suitcase.

The Ninth Circuit upheld Mrs. Schafer's conviction for violating the federal drug act--21 U.S.C. § 360a(c)(1)--but was careful to mention that the search there was not a "criminal" search but an "administrative search." The Court cited Frank v. Maryland, 359 U.S. 360, 383 (1959) where it read: "The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." And it continued saying: "The Court in Camara[6] read this language to mean that a 'criminal' standard of probable cause would not be imposed on administrative inspections." 461 F.2d at 858.

Further on--461 F.2d 859--the Court said:

". . . Moreover, the decision to inspect is not 'subject to the discretion of the official in the field.' 387 U.S. at 532, 87 S. Ct. at 1733. In view of the fact that a quarantine inspection is not a search 'which has as its design the securing of information . . . which may be used to effect a

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[6] It refers to Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967).

> further deprivation of life, liberty or property,' [citing from Frank v. Maryland] and the fact that 'it is doubtful that any other canvassing technique would achieve acceptable resulted,' [citing Camara,] we think that the general administrative determination of the necessity for these baggage searches at the Honolulu airport satisfies the 'probable cause' requirements of Camara."

As we have seen, the federal Supreme Court has established distinction between administrative searches or inspections and those carried out with the purpose of detecting the commission of crimes, which are called "criminal" searches. The requirement of probable cause for the latter is fundamental to surmount the Fourth Amendment prohibition. Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967). Check Riester & McMillen, Administrative Inspection Procedures Under the Fourth Amendment--Administrative Probable Cause, 32 Albany L. Rev. 155, 171-172 (1967); The Law of Administrative Inspections: Are Camara and See Still Alive and Well?, 1972 Wash.U.L.Q. 313, 322 (1972); Rothstein & Rothstein, Administrative Searches and Seizures: What Happened to Camara and See?, 50 Wash. L. Rev. 341, 345, 356 (1975).

The instant case and Schafer are different in that: the law invoked in Schafer to justify the search was a federal law, applicable to all the states, to the Commonwealth of Puerto Rico, to territories and possessions and to the District of Columbia, while the search carried out here finds support in a local law which applies only to Puerto Rico; the search in Schafer responded to an administrative purpose, while here it was directed at seeking "firearms, explosives, narcotic substances, depressants or stimulants or similar substances," mentioned in section 1 of Act No. 22 with the purpose of instituting criminal prosecutions; and, Mrs. Schafer, warned by the decree of the Secretary of Agriculture, should have known when leaving Hawaii that there was a quarantine and that she would be subject to a search by federal Agriculture officials, while in the instant case, appellant arrived at Puerto Rico from the State of Florida and had no reason to anticipate that he would be searched here.

By analogy, one could point out that the reasonability of searching individuals before boarding a plane has been sustained as part of the precautions against hijacking based on that said persons may decide not to board the plane. This trend is elaborated in United States v. Davis, 482 F.2d 893 (1973): "In sum, airport screening searches of the persons and immediate possessions of potential

passengers for weapons and explosives are reasonable under the Fourth Amendment provided each prospective boarder retains the right to leave rather than submit to the search". United States v. Davis, supra, at 912. See also United States v. Miner, 484 F.2d 1075, 1076 (1973), and United States v. Homburg, 546 F.2d 1350, 1352 (1976).

It should be noted that regardless of the present need for searches of passengers to prevent hijacking, one generally presupposes that there was consent, whether express or implied, on the part of the passenger and the constitutional objection is obviated. United States v. Bell, 464 F.2d 667, 675 (1972), cited in United States v. Skipwith, 482 F.2d 1272, 1276 (1973). The situation under which the search to prevent hijacking is carried out is different from that contemplated in Act No. 22. Searches to prevent hijacking are conducted at the one and only opportunity available to avoid the disaster which can cause the loss of hundreds of lives if the armed hijacker enters the plane. That is why they have sometimes been compared to border searches. The assumption that the passenger has consented based on his right to decide between allowing the search or deciding against boarding the plane has not been exempt from criticism in spite of the reasonability of the search. United States v. Albarado, 495 F.2d 799, 806-807 (1974); United States v. Kroll,

481 F.2d 884, 886 (1973); Airport Security Searches and the Fourth Amendment, 71 Colum. L. Rev. 1039, 1048-1049 (1971).

The functional equivalent of a border mentioned in Almeida-Sánchez, supra, at 22-273, was recently discussed in United States v. Mirmelli, 421 F.Supp. 684 (D. C. New Jersey 1976) (certiorari pending consideration before the Supreme Court of the United States). Said concept has been broadened to include not only those airports in the interior of the United States to which nonstop flights from outside of the United States arrive, but also those airports in which there are facilities for customs and immigration inspections.

In spite of the fact that said case dealt with a functional equivalent of a border, as we have seen, the validity of the search conducted in that case was sustained on the existence of probable cause. A passenger airplane from Florida landed at Teterboro Airport, New Jersey. Instead of passengers a large number of cartons were unloaded from the plane and were rapidly carried by the plane crew to a van with New York registration.

Although the information obtained by customs inspectors indicated that the cartons contained ceramics, they were transported from the plane to the van in a rough and inappropriate way for such merchandise. On the other hand,

the van's rental agreement indicated musical instruments were being transported. In view of such facts, customs inspectors consulted their superior and after being authorized by him they proceeded to ask that one of the cartons be opened and found marihuana inside. The circumstances of the instant case are very different from those present in the aforementioned case.

We realize that our government has made an effort to prevent the entry into our Island of narcotic drugs, firearms, and explosives, at a moment in our history in which the rise in its illegal traffic maintains people in a state of constant worry and anxiety. Nevertheless, the reasonability required by our Bill of Rights and by the Fourth Amendment to allow searches cannot be made dependent on the historical situation. We again cite Almeida Sánchez, supra, at 274-275:

> "The Court that decided Carroll v. United States, supra,[7] sat during a period of our history when the Nation was confronted with a law enforcement problem of no small magnitude--the enforcement of the Prohibition laws. But that Court resisted the pressure of officials expedience against the guarantee of the Fourth Amendment. Mr. Chief Justice Taft's opinion for the Court distinguished between searches at the border and

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[7] 267 U.S. 132 (1925).

> in the interior, and clearly controls the case at bar:
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> "' It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.' 267 U.S., at 153-154."

Justice Frankfurter made the following warning in his dissent in Harris v. United States, 331 U.S. 145, 160-161; 67 Sup. Ct. 1098; 91 L.Ed.

1399, 1411 (1946):[8]

> ". . . If one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society."

Justice Brandeis, cited by Justice Frankfurter in the dissenting opinion mentioned, stated that the framers of the Constitution ". . . conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v. United States, dissenting opinion, 277 U.S. 438, 478 (1927); 72 L.Ed. 944, 956.[9]

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[8] The dissent eventually became the Supreme Court's position upon reversing Harris. Chimel v. California, 395 U.S. 752 (1969).

[9] Later in Katz v. United States, 389 U.S. 352 (1967) Olmstead was reversed and the dissent became the ruling.

The Fourth Amendment had its origin in the violent reaction on the part of the North American people towards the so-called "writs of assistance" of the colonial era, by virtue of which homes of citizens were searched indiscriminately. Their importance has prevailed in the words of John Adams upon commenting on the famous speech by James Otis, Attorney General, of the Massachusetts Bay Colony, when the latter resigned to his position in protest of the abuse of said search warrants. Otis' speech ignited the spirit of the settlers to rebel against said warrants. Referring to said speech Adams wrote: "American independence was then and there born." 10 Adams, Works 247.[10] See Blackford v. United States, 247 F.2d 745, 748 (9th Cir. 1957).

That is the genesis of the provision of our Bill of Rights which protects people from the abuse of unreasonable searches. Upon defending the guarantee recognized by our Constitution as well as those of the States of the Union we cannot be less demanding than the highest Federal Court.

The special relationship between Puerto Rico and the United States,

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[10] [Translator's Note: This footnote consists of the English text of Adam's famous phrase copied above in the text of the opinion and translated into Spanish in the original.]

based on the existence of a compact--Public Law 600, 81st Cong., 1 L.P.R.A., Vol. 1, pp. 136-138--does not empower us to consider the United States as a foreign country and to subject all persons arriving at Puerto Rico from the United States to an indiscriminate search of their persons and their belongings, without a search warrant and without probable cause or reasonable grounds. The Commonwealth is not an associated republic. Far from that, it is a political condition adopted by us in Puerto Rico based on, among other fundamental principles, our union with the United States, and on that the common citizenship "and our aspiration continually to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges" are determining factors in our life. Preamble of the Constitution of the Commonwealth of Puerto Rico.

Our geographic condition as an island does not justify making our case an exception to the Fourth Amendment. Neither will anyone argue that said exception would prove ineffective for Hawaii and Alaska due to the fact that they are not territories connected to the 48 continental states lying to the south of Canada and to the north of Mexico. Hawaii is an archipelago more distant from the continent than Puerto Rico. Alaska is peculiar in that it is geographically separate from the other states and has a border with another country.

Puerto Rico has no boundaries with other countries.

Besides, although we are an island, our seaports are not the major entries and exits to those traveling between Puerto Rico and the continent. Most people traveling to and from here do so by plane. When traveling by plane, it is irrelevant whether the surface flown over is land or sea. Thus the distinction that could be made regarding our condition as an island is unimportant. We are an island with regard to travel by sea. When traveling by plane there is no difference between going from here to Miami or from Miama to New York.

Finally, supposing that the Fourth Amendment were not applicable to Puerto Rico to the effects of Act No. 22 discussed here, we cannot disregard the fact that this prohibition would subsist under the Constitution of the Commonwealth which sets as a limit to the police action, apart from the specific prohibition against unreasonable searches, the principle of inviolability of human dignity. Constitutional guarantees were not adopted for a particular time and place. These principles are tested precisely when there is a rise in a certain type of crime and collective hysteria swells, and the courts of justice are the ones called upon to enforce them as essential values of the democratic order that we enjoy.

When these principles are enervated the monster of arbitrariness and despotism will come forth. The Constitution is a Supreme Law adopted directly by the supreme legislator--the People. It does not authorize departure from its provisions nor does it authorize any action against its prohibitions. The constitutional provisions which guarantee the enjoyment of freedom cannot be enervated when public order is undermined at a given moment. To make an exception due to a particular situation would destroy the democratic system forever.

The second half of section 1 of Act No. 22 (1975), provides that "in order to detain, question, and search persons" arriving from the United States, the Police must have grounds "to suspect [they illegally carry] firearms, explosives, depressants or stimulants or similar substances." Nevertheless, the first half of said section 1 empowers and authorizes the Police of Puerto Rico "to inspect the luggage, packages, bundles, and bags" of said persons without requiring reasonable grounds. In other words, it authorizes the Police to search the baggage, packages, bundles and bags of passengers indiscriminately. We do not see how this can be done without stopping the person. In fact, appellant was stopped when asked to accompany the agents with his luggage to the Criminal Investigations Bureau's office at the airport, without there

being reasonable grounds to believe he was violating the law. Appellant had no alternative in view of said request.

Neither the Fourth Amendment of the Federal Constitution nor Art. II, Sec. 10 of ours distinguish the search of persons from the search of their belongings with regard to the reasonability requirement. The Fourth amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

And Sec. 10 of Art. II of our Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
>
> "Wire-tapping is prohibited.
>
> "No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported

> by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.
>
> "Evidence obtained in violation of this section shall be inadmissible in the courts."

In view of such clear constitutional provisions we must conclude that the searches authorized by Act No. 22 are prohibited. A law, no matter how commendable its purposes might be, cannot authorize what the Constitution prohibits.

If the aforesaid Act were construed as though it authorized the detention and the search of persons as well as the search of their belongings only when there existed reasonable grounds which would surmount the probable cause requirement, then we would have to conclude that the passage of said Act by the Legislature constituted a futile and inconsequential action, for it was tantamount to repeating what had already been established in Puerto Rico through case law and legislation. Under Rule 231 of the Rules of Criminal Procedure[11] a search by a peace officer

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[11] "Rule 231. Search Warrant; Requisites for Issuance; Form and Contents

A search warrant shall not be issued except upon a written statement, made before

is allowed only through a warrant issued by a magistrate in the face of a written and sworn statement, after he is convinced that there is probable cause or without a warrant, when the search is incidental to a valid arrest. People v. Torres Resto, 102 D.P.R. 532 (1974); Rolón v. Superior Court, 96 P.R.R. 448 (1968); People v. Riscard, 95 P.R.R. 394 (1967). We must point out that in the second situation--search incidental to a valid arrest--the requirement of reasonability is always present, since

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footnote 11 continued:

> a magistrate under oath or affirmation, which shall set forth the facts tending to establish the grounds for the issuance. If from the affidavit and the examination of the affiant, the magistrate is satisfied that there is probable cause for the search, he shall issue the warrant, naming or describing particularly the person or place to be searched and the things or property to be seized. The warrant shall state the grounds for its issuance and the names of the persons on whose affidavits the warrant is based. It shall order the officer to whom it is directed to forthwith search the person or place named for the property specified, and to make a return of the service of the warrant to the magistrate, together with the property seized. The warrant shall direct that it be served in the daytime, but the magistrate, by reason of necessity and urgency, may direct that it be served at any time of the day or night."

the existence per se of a lawful arrest does not validate ipso facto a search or a seizure without warrant. People v. Dolce, decided on December 13, 1976, Ref. Col. Abog. (Advanced Sheet Bar Association) 1976-115; People v. Costoso Caballero, 100 P.R.R. 146 (1971); People v. Polanco Marcial, 95 P.R.R. 457 (1967); People v. Sosa Díaz, 90 P.R.R. 606 (1964).

Another opinion delivered in this case defends the constitutional validity of Act No. 22 under a theory which states that searches herein authorized may be considered part of the power of the Commonwealth to adopt inspection laws as part of its regulatory power called police power or state police power.[12]

We are not discussing the power of the State and of the Commonwealth to adopt general inspection laws under the police power. We must understand, nevertheless, that the purpose of said laws is to authorize administrative inspections and not those with criminal purposes. None of the authorities cited: Gibbons v. Ogden, 9 Wheaton 1, 6 L.Ed. 23 (11824), Brown v. Maryland,

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[12][Translator's Note: After making reference in the text of the opinion to the so-called "poder policial" or "poder de policia del Estado" in footnote 12, Mr. Justice Irizarry Yunqué merely gives the English equivalent for said terms, to wit: police power].

12 Wheaton 419, 6 L.Ed. 678 (1827); Mayor of New York City v. Miln, 11 Peters 102, 9 L.Ed. 648 (1837), Patapsco Guano Co. v. Board of Agriculture, 171 U.S. 345 (1898), Compagnie Francaise v. State Board of Health, Louisiana, 186 U.S. 380 (1902)--upon which said opinion is based--involve statutes authorizing the inspection of objects or persons directed to obtain evidence on criminal activity or to prevent it, as is the case of Act No. 22.

Gibbons deals with a state law authorizing monopoly in the operation of steamships which constitutionally contravened a federal law which granted licenses for operating ships. Brown v. Maryland referred to a state law requiring that everyone who sold imported goods obtain a state license before selling the objects. Mayor of the City of New York deal with a law requiring all passenger ship masters from other states of the Union or foreign countries entering the New York harbor to submit a written report on the name, place of birth, and last residence, age and occupation of every one of the ship's passengers, whether a foreigner or an American citizen (except for New York) and of every passenger who had left the ship or gotten aboard during the trip with the purpose of going to New York. Patapsco Guano Co. dealt with a state law allowing for the inspection of fetilizers, whether produced in this state or another, with the purpose of protecting citizens from fraud.

Compagnie Francaise referred to a state law for quarantine which, among other things, forbade healthy persons from entering quarantined communities.

In California v. Thompson, 313 U.S. 109 (1941), state power to adopt inspection laws is reaffirmed but the purpose of this is not thought to be the discovery of criminal evidence but rather the protection of the people against fraud and the protection of public welfare.

The opinion cites Stephenson v. Dept. of Agriculture, 342 So.2d 60 (1977) whose appeal was denied by the Supreme Court (46 L.W. 3005, 3180). In this case the Supreme Court of the State affirmed the constitutionality of a state law which ordered all motor vehicles, trucks, and hawling trucks to stop at inspection stations of the State Department of Agriculture and Consumer Services to be inspected. It held that this constituted a valid exercise of the State's police power.

The Supreme Court of Florida, upon declaring the law valid, was careful in pointing out that the searches authorized must be based on the existence of a search warrant and in its defect, based on acceptable legal reasons. The court said:

> ". . . Upon stopping, the majority of operators of such vehicles will probably have no objection to such an inspection and will consent to same; but as

> provided in the statute, if access is refused, the vehicle may not be searched without the inspector obtaining a search warrant or without a legal basis for search without a warrant pursuant to established law. Such in no way impairs appellants' right to be free from unreasonable search and seizure, their right to due process of law, or their right to equal protection of the law. We do not find that it violates any constitutional right of appellant. . . .
>
> "The inspections authorized by statute in the case sub judice fall in a different category. Agricultural inspections appear to be more nearly akin to drivers' license checks than detentions for criminal investigations . . ." (342 So.2d 60, 62 (1977)).

In view of these expressions on the part of the state court we can understand that the denial of the appeal on the part of the Federal Supreme Court can be interpreted as an affirmation of an unlimited discretional power of the state to conduct inspections or administrative searches.

United States v. Biswell, 406 U.S. 311 (1972) is not applicable to the instant case either because it does not deal with a state inspection system to insure evidence for criminal purposes. The regulatory inspection discussed in this case is directed to businesses of

licensed firearms dealers with the purpose of determining whether they are complying with the federal rules on sales of firearms.

To interpret that where Act No. 22 authorizes the search of passengers' suitcases, bags, and luggage without a search warrant or reasonable grounds, it is merely authorizing administrative inspections under the State's police power, would be to force the letter and spirit of the law beyond what is reasonably permitted. The searches authorized by said statute do not have the exclusive purpose of seizing objects. The facts of this case demonstrate this. Appellant was stopped, accused, tried, and convicted as a result of the search of his luggage conducted pursuant to said act. The police power of the state is not synonymous to the power of the police to stop persons and search them without reasonable grounds. The latter is what Act No. 22 authorizes against the clear constitutional provisions which forbid it.

The judgment appealed should be reversed and the appellant acquitted.

Appendices

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico, Plaintiff and appellee	Judgment of the Superior Court, San Juan Part, Charles E. Figueroa, Judge
v.	No. Cr-77-24
Terry Terrol Torres Lozada, Defendant and appellant	Violation of Art. 404, Controlled Substances Act Constitution-ality of Act No. 22 of August 6, 1975

Opinion delivered by MR. JUSTICE DIAZ CRUZ.

San Juan Puerto Rico, December 14, 1977

Appellant arrived at Isla Verde International Airport on a commercial flight from Miami, Florida. His behavior and appearance caught the attention of Puerto Rico Police agents assigned to the airport, who without a search warrant nor reasonable grounds to arrest, conducted a "routine checkup" of the visitor's luggage, pursuant to the provisions of Act No. 22 of August 6, 1975 (25 L.P.R.A. § 1051 et seq.). From one of his suit-cases the agents seized a paper bag containing a shredded substance which turned out to be marihuana, a wooden pipe with residues of said substance and

$250,000 in cash. In the trial held for the violation of art. 404 of the Controlled Substances Act (24 L.P.R.A. § 2404), the defendant moved for the suppression of the evidence seized from his luggage because it had been obtained as a result of an illegal search, he contested said Act No. 22 on the grounds that it was repugnant to the Fourth Amendment of the Constitution of the United States as well as to Art. II, Sec. 10, of the Constitution of the Commonwealth of Puerto Rico. The trial judge rejected the argument on the authority of Henderson v. United States, 390 F.2d 805; John Bacall Imports, Ltd. v. United States, 287 F. Supp. 916; United States v. Stornini, 443 F.2d 833 (1st Cir.);[1] and Cervantes v. United States, 263 F.2d 800 (9th Cir.). He also cited as grounds for decision the following: "It is a well-known fact that Puerto Rico faces a serious problem with the traffic and smuggling of narcotics, firearms, and explosives on the part of individuals who travel freely between Puerto Rico and the United States. Said problem has worsened during the last few years notwithstanding the measures taken by local as well as federal authorities to cope with the same. This is mostly due to the fact that Puerto Rico does not have at its airports and docks an office for the inspection of luggage, packages,

[1] "Customs officials may search an individual's baggage and outer clothing in a reasonable manner, based on subjective suspicion alone, or even on a random basis." Stornini, supra.

bundles, and bags of passengers and crew members who travel between Puerto Rico and the United States. Thus, the need arose for the Government of the Commonwealth of Puerto Rico to set up some sort of effective and corrective measure to eliminate this increasing illegal traffic which was progressively becoming more profitable in view of the fact that there was no control on the part of the United States government. The federal government exerts no effective control in this area; it only conducts sporadic inspections carried out by the United States Department of Agriculture when checking for tropical plants and fruits which may be harmful to public health and agriculture. . . . Puerto Rico's present circumstances require that courts reexamine the legal doctrines in effect, adapt Law to present circumstances, and adopt the rules that best serve the interests of society as a whole, particularly when public safety and perhaps even its own existence is at stake."

The defendant was convicted and sentenced on January 7 of this year to serve from 1 to 3 years imprisonment; the arguments on appeal are basically directed to contest the legality of the search and the constitutionality of the Act.

I

Act No. 22 of August 6, 1975, distorted.

According to some criteria, routine inspection of luggage and packages at

the airports and docks of Puero Rico constitutes a violation of the Fourth Amendment of the Constitution of the United States and of Art. II, Sec. 10, of ours. Let us first reread art. 1 of Act No. 22. It is evident from its text that the Police is authorized by said Act to carry out two different activities at airports and docks: on the one hand, the inspection of luggage, packages, bundles, and cargo which does not require "reasonable grounds"; and on the other, the detention, questioning, and search of individuals with regard to which there are reasonable grounds to believe that they illegally carry about their persons firearms, explosives, narcotic substances, depressants, stimulants, or similar substances. We must not confuse two concepts so carefully set apart by the lawmaker as are the inspection (of luggage and cargo) and the search (of individuals) disregarding the clear wording of the statute and seeking support in ambiguous expressions voiced in the legislative debate by representative Del Valle Escobar, who is not a lawyer, but who said enough to disallow the position that this Act does not grant more authority to inspect luggage than that authorized by the Rules of Criminal Procedure, and we quote from the Diario de la Cámara* (July 2, 1975):

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*Translator's Note: Reference is made to the Journal of Proceedings of the House of Representatives.

"Mr. López Soto: With regard to the authority granted to the Police, must it be granted through this Bill, doesn't the Police already have it as such?

"Mr. Del Valle Escobar: We were informed by the Police Superintendent and the Secretary of Justice, that it does not have said authority at this moment, that it has to be granted by law. That is why this Bill should be approved.

"Mr. López Soto: Why doesn't the Police have this authority?

"Mr. Del Valle Escobar: Customs does not properly inspect the luggage and the arrivals of these individuals to Puerto Rico. With this Bill the Police is authorized to observe any suspect and to inspect his luggage. . ."

This portion of the legislative debate has sometimes been disregarded and the Legislature charged with an empty gesture on the grounds that the parliamentary debate shows that Act No. 22 "did not mean to grant the Police more authority than that permitted by the Rules of Criminal Procedure." The lawmakers, as well as the Secretary of Justice, and the Police Superintendent, on whose reports Representative Del Valle Escobar based his recommendations, knew that the Rules of Criminal Procedure, which were in effect since the year

1963, authorized the search of luggage and merchandise with reasonable grounds. They were also aware of the fact that said Rules applied to airports and docks within Puerto Rico's territorial limits. Their recommendation, which was accepted by the Legislature, was not aimed at seeking legislation to extend the Rules of Criminal Procedure to airports and docks but rather to give law enforcement officers an instrument not provided by said Rules, to wit: the authority inspect luggage and cargo even when there is no reasonable ground for said action. This argument attributing ignorance and futility to the action of the Legislature contemplates the possibility that, in the future, legislation may be passed extending the Penal Code to Ponce or the Mortgage Law to Caguas.

Maintaining the case in its right prospective, we must conclude that the purpose of the Act was not to promote tourism.[2] What was actually needed to strengthen public order and safety was a method which would allow the inspection of luggage by the Police without interfering with its owners, an unpretentious copy of the border search

[2]Despite the lengthy constitutional debate on inspections and searches and the statement of motives of the Act, it has been suggested that the purpose of Act No. 22 was related to the development of tourism.

or its functional equivalent already recognized by North American public law. Hence, the basic distinction in its text between inspection of luggage and search of persons. To argue the opposite would be to charge the Legislature with a blunder, the superfluous and futile act of approving for airports and docks the same search and seizure rules that since 1963 apply within their limits. By isolating certain phrases from the general context of the confusing legislative debate, it might be possible to arrive at such an odd conclusion but the text of the law finally enacted is perfectly clear. Consistent with the judicial power's fundamental deference to the logic, intelligence, and capacity of our legislators, who did not abdicate the right of Puerto Rico to protect its people, we are bound by the clear text of the statute and not by the ambiguity of the debates.

II

Inherent power of the State

Article II, Sec. 10, of the Constitution of the Commonwealth of Puerto Rico provides that:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
>
> "Wire-tapping is prohibited.

"No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.

"Evidence obtained in violation of this section shall be inadmissible in the courts."

The Fourth Amendment of the Constitution of the United States expresses:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The basic protection, which is at the same time a curtailment of the excessive intrusion on the part of the Government, is against "unreasonable" searches and this concept of reasonability or the lack of it is the prevailing concept in the Constitution of the United States as well as in our Constitution. Reasonability is determined by taking all circumstances into consideration, particularly those that

demand urgency in pursuit of a balance between individual rights and society's needs. Terry v. Ohio, 392 U.S. 1 (1968); Elkins v. United States, 364 U.S. 206 (1960); United States v. Biswell, 406 U.S. 311 (1972). The lawfulness of warrantless searches of individuals and vehicles crossing the border even in the absence of probable cause, had early recognition in Congressional legislation and judicial doctrine. Boyd v. United States, 116 U.S. 616 (1886); Carroll v. United States, 267 U.S. 132, 134 (1925). The exception is based on the concept of national self-protection which requires that upon arrival a person has to identify himself as entitled to enter, and his belongings as effects which may be lawfully brought in. Carroll, supra. From the beginning, laws authorizing the search and seizure of objects of prohibited possession by individuals, such as counterfeit currency or contraband, were not embraced within the prohibition of the Fourth Amendment. Boyd v. United States, 116 U.S. 161, 624 (1886); cf. United States v. Ramsey, 52 L.Ed.2d 617, 626 (1977).

Under this premise, it has been held that routine inspections and searches of individuals and their luggage at borders or points of entry may be carried out even without probable cause. The authority to carry out these searches is extended to the so-called "functional equivalent" of the border, including an airport to which

an airplane arrives after flying over the border. Almeida-Sánchez v. United States, 413 U.S. 266, 272-3 (1973); cf. United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975).

Puerto Rico is a country organized under a constitutional form of government; its political authority extends to the Island of Puerto Rico and to the adjacent islands within its jurisdiction. Constitution, Art. I, Sec. 3. The government of Puerto Rico has the obligation of maintaining public peace and security, essential elements of a people's faith in justice, and of a courageous, industrious, and peaceful life, ideals that are set forth in the Preamble of our Constitution. In 1975 Puerto Rico's Legislature acknowledged the existence in our country of a serious public safety problem promoted by the illegal introduction of firearms, explosives, and narcotic drugs through our airports and docks by passengers and crew members arriving from the United States, and in the Statement of Motives of Act No. 22 of August 6, 1975, pp. 658-9, it stated the following:

> "Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, tranfer and use of narcotic drugs, firearms, and explosives.

> "It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law. The Federal Government does not require these passengers or crew to go through the Customhouse after arrival in the Island for inspection of their luggage or person. This has contributed greatly to an increase in the smuggling of firearms, explosives, and narcotic drugs by this [sic] means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship [sic].
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> "The inspection of luggage, cargo and persons to reduce the introduction of firearms, explosives, and narcotic drugs illegally brought from the United States to Puerto Rico is a legitimate area of control on the part of our government in exercising its police power, especially when the same is not covered by the Federal Government, and there is no conflict of authority on this matter between both governments.

To cope with this situation, the first section of the Act provides:

> "The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcatics, depressants or stimulants or similar substances."

The Act authorizes routine and random searches of luggage and bundles at points of entry in our country such as airports and docks which may be, by analogy, considered "border": Almeida-Sánchez, supra. The Legislature acted in the valid exercise of its power to protect the life, freedom and property of the three million Puerto Ricans who live on the Island[3]. The State's

[3]Such action on the part of the Legislature--in the absence of federal regulation--does not create a conflict with this jurisdiction. "Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations, applicable to articles of interstate commerce designed to safeguard the inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce." California v. Thompson, 313 U.S. 109, 114 (1941).

interest in curbing the arrival at our shores and airports of destructive, degrading, or deadly instruments, has precedence over the right of those arriving to not have their luggage searched. The individual's right to privacy yields to the more preponderant right of the vast Puerto Rican community. To think that when fighting such a serious threat to society's very existence the Government has to yield to constitutional demands good in other times and places, is to disrupt the balance between society's interest and the individual's interest. Those who bring weapons, narcotics, and explosives into our country do not stall. The Constitution has to be construed in harmony with the times, honoring a reality contained in Jefferson's phrase: "The world belongs to the living generation."

The Commonwealth has its origin in Public Law 600 of the 81st Congress entitled "An Act to provide for the Organization of a Constitutional Government by the People of Puerto Rico" its preamble reads as follows:

> "WHEREAS the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and
>
> "WHEREAS under the terms of these congressional enactments an increasingly large measure of self-

government has been achieved: Therefore

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." L.P.R.A., Vol. 1, pp. 136-137.

The body politic that eventually was created by mutual agreement between the Congress and the People of Puerto Rico is not a federate state, even though it is within the constitutional structure of the United States. Its creation responded to ethnic, cultural, and geographical differences, that is why it is considered a unique entity[4] where, with limited incidence, laws and principles of federation operate in a different way to the uniform standards that govern the States of the Union.

In the area with which this case is concerned--the inspection of luggage

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[4] Mora v. Mejías, 115 F. Supp. 610 (1953); Wackenhut Corp. v. Aponte, 386 U.S. 268 (1967); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Examining Board of Engineers v. Flores de Otero, 426 U.S. 572.

of travellers arriving at our International Airport from the United States--our island borders stand out as an exception shared only with the State of Hawaii. Puerto Rico is a 3,600 square mile island completely surrounded by the international waters of the Caribbean Sea and the Atlantic Ocean. This results in a severance of the geographic continuity which merges 48 of the states of the Union into a single territorial body whose safety and order is protected by Congressional and state legislation. Hence, those states are not as vulnerable as Puerto Rico to the entry into their territories of smugglers and traffickers of illegal merchandise.[5] These circumstances have created in Puerto Rico a de facto border for "domestic" travelers which requires as much surveillance as United States international borders. Since federal authorities have not pre-empted the field, there was a sufficient delegation of that fundamental power that belongs to every state, the protection of the safety of its people, in the recognition by Congress of "the right to

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[5] It is a known fact that Puerto Rico is the distribution center for all types of smuggled goods. Besides weapons and narcotics, the heavy traffic also includes diamonds, to such a point that Peter Hamill's New York Daily News syndicated column has called San Juan the "dirty and dangerous centerpiece of the international diamond racket." (San Juan Star, Oct. 21, 1977.)

self-government of the people of Puerto Rico" and the expressed intention "that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." (Public Law No. 600, ante.) The power of the Commonwealth to protect the safety of its residents "is consubstantial with its existence as a State, and inseparable from its police power." Commonwealth v. Rosso, 95 P.R.R. 488, 523-4 (1967).

Stereotyped uniformity is not a characteristic of contemporary North American constitutional doctrine. In an important matter such as freedom of speech, communities are to decide on the obscenity of a publication according to their own standards of propriety and morality. Miller v. California, 413 U.S. 15 (1973); Hamling v. United States, 418 U.S. 87 (1974). Puerto Rico has no reason, then, to adopt an inflexible attitude towards passenger movement between states, when in any case, it is excluded by the special political and geographical structure of the Commonwealth which distinguishes it from the States.

A body politic organized under a constitutional system of "self-government," even with a minimum degree of autonomy, is inevitably empowered to exercise the police powers necessary for its own safety and preservation, closing doors to possible threats to public peace in its territory and supplying surveillance in areas that are not protected by the central metro-

political power.

The provision of Act No. 22 authorizing routine inspections and searches at points of entry to Puerto Rico is fully justified and kept within the concept of reasonability which is a parameter of the constitutional clauses that offer protection against undue interference of the State with the person. Said Act No. 22--the product of a careful and reasonable balance of interests--does not contravene the Fourth Amendment of the Constitution of the United States nor Art. II, Sec. 10, of ours. The search and seizure carried out in the circumstances of this case do not overstep the standard of reasonability.

The obligations assumed by the United States through the Treaty of Paris of 1898 for the protection of life and property in Puerto Rico and the powers that through said Treaty were vested in Congress for the determination of the civil rights and political status of the Island's inhabitants; Public Law 600; the federal case law acknowledging the concept of a de facto border,[6] the unique character of the Commonwealth

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[6] The concept of de facto border or its functional equivalent was accepted in United States v. Mirmelli, 421 F.Supp. 684, where interference with merchandise is interstate commerce on mere suspicion was justified.

within the United States constitutional structure and the modern trend of the National Supreme Court favoring the States' as well as the communities' autonomy, thus encouraging diversity within the federation (Miller v. California, 413 U.S. 15 (1973); Kewanee Oil v. Bicron Corp. 416 U.S. 470 (1974), constitute strong foundations of the constitutionality of Act No. 22. Occasionally, definitions that are just a reverence to the past contained in the Immigration and Nationality Act (8 U.S.C. §§ 1101-1503) and in the Federal Plant Pest Act (7 U.S.C. §§ 150aa-150gg) in which we are included as a "possession" of the United States are brought as arguments against them. The effect of this argument is as if in tomorrow's paper we were to find this headline: The SS "Maine" is sunk in Havana harbor.

To deny constitutionality to the Act would produce, as an end result, two unacceptable premises: 1st, this Court would deprive the Executive Branch of an instrument to fight contemporary crimes like terrorism, drugs, and murder that has been used moderately and following strict standards of civility, since Police searches luggage in sporadic cases when confidential information is received or when a passenger acts suspiciously. A decision of the Court in this sense would impair the fundamental power of every state, or organized government if we choose not to recognize the national structure of Puerto Rico, to guarantee peace and

safety within its territory; and 2nd, by disregarding our frugal self-government, this Court would incur in the juridical anomaly of establishing a double standard for privacy at the Isla Verde International Airport: federal Customs and Immigration officials may freely stop passenger arriving from foreign country only two steps away from Puero Rico's law enforcement officers who cannot stop travelers moving between the United States and Puerto Rico. That is, a Puerto Rican or an individual of any other nationality arriving at the Airport from Switzerland, Japan, or Argentina has less personal dignity in the eyes of federal agents who are not discouraged by their privacy, than the traveler arriving from the Bronx, Chicago, Chinatown, or San Francisco, who is untouchable. To protect such inequality under a constitutional cloak was inconceivable even in the days of the horse and buggy.

Puerto Rico, as every other country in the free world, faces very serious problems in terms of public safety and public order. The Constitution is a living organism, it is the Law of the Land adopted to rule and protect civilized society. The much handled cliché about the "price we must pay for freedom" should not be inflated to a point in which free institutions must yield to anarchy, terrorism, and murder. A slight inconvenience to a suspicious traveler who is required to open his packages or his handbag, a practice

to which travelers in all ports of entry in the civilized world are used to, does not justify the annulment of Act 22 which authorizes these searches and which represents the will of the people seeking respite from the merciless blows of crime.

There are those who refuse to acknowledge the Puerto Rican's right to self-protection because we have no "borders" except those of the United States. But in the belief that even those of us who have had to live "without borders" have a right to peace and security in our society, this opinion based on the decisions of the Federal Supreme Court in Brignoni-Ponce, Ortiz, and Almeida-Sánchez, classifies our airport as a "functional equivalent" of a border and in doing so we have not had to abandon the North American constitutional doctrine.

If the argument that Act No. 22 does not give the Police more power of inspection than that already conferred by the Rules of Criminal Procedure prevails, the Legislative Assembly would have performed a useless act. When Sec. 1 speaks about "reasonable grounds" it refers to the search of individuals, but not to the inspection of baggage, luggage, handbags, and packages. This was a restriction imposed by the Legislature of Puerto Rico since, as we can see in the cases cited, the Fourth Amendment of the Constitution of the United States is not applicable at "borders" or

at "functional equivalents" of borders.

The Act was adopted to take a stand against the helplessness of the country vis-á-vis the increasing traffic of weapons, drugs, and explosives. This situation called for a mechanism similar to the one used by immigration at borders, more radical than those provided by the Rules of Criminal Procedure. This is the purpose of the Act, clearly stated in its statement of motives, regardless of the interpretation given to any of the arguments voiced by one of the House Committee members. The wording of the Act should be its first source of interpretation, and the one under our consideration clearly states:

> "The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country . . ."

The Police has a terse mandate of the Legislature to protect this society in the critical area of entry into the country. Annulment of the Act to require reasonable grounds or probable cause would have two unfortunate consequences: either the Executive Branch abandons the inspection of baggage at the airport and keeps the doors open for the introduction of smuggled goods

into our country, or the Police will find "reasonable grounds" to interfere, not only with baggage and handbags, but with individuals.

It would at least be a strange endeavor for this Court to minimize action by Congress in Public Law 600 hightening the principle of "government by consent of the governed" and giving Puerto Rico power to "organize a government pursuant to a constitution of their own adoption," instead of making way for the Supreme Court of the United States to pass upon the validity of the constitutional issue. This legislation on the part of Congress springs from the obligation assumed by the United States under International Law to protect life and property in Puerto Rico (Art. I of the Treaty of Paris of 1898) and the statement in Art. IX of the Treaty, to the effect that the civil rights and political status of the native inhabitants of the territories ceded to the United States would be determined by Congress. Is the child of the will of Congress so maimed and crippled that it is condemned to be the defenseless prey of vulgar transgressors who trample on the right to life, freedom, and property of this people? Life is made up of trifles and fundamental things. We must grasp the first in order to not lose track of the latter. Let us not relinquish the dignity of our country to the suitcases of a smuggler.

III

Judicial review of laws

This is the most impressive power of the Supreme Court as the keeper of the Constitution. In American constitutional development it won against a vibrant nucleus of opinion who saw in this attribute the surrender of public power to a "robed oligarchy." Only moderation and educated abstention on the part of the Judicial Branch in the exercise of this power has preserved its prestige and approval in the eyes of the people.

The Legislature of Puerto Rico, the purest and most legitimate representative of the people's will, adopted Act. No. 22 as society's urgent and critical protective measure against the appalling degree of violence that has quashed people's right to life, freedom, and property. It was not enacted as a hysterical reaction, but responding to a state of anguish and insecurity that has befallen Puerto Rico. The Legislature acted out of humanity rather than by legislative duty. In doing so it received the advice of the Secretary of Justice, of eminent lawyers who hold seats in the House and Senate, and of the Congressional Research Service[7] of the Library of Congress. It

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[7] Report submitted by the Library of Congress to Commissioner J. Benítez, on June 4, 1975.

will be very difficult for our people to understand how a Legal system can possibly surrender the dignity and safety of three million Puerto Ricans to the right of a smuggler to not have his suitcases opened. The purpose of the Constitution was to protect the rights of the people, not to yield to the Government or to common transgressors.

The exercise of judicial power to annul legislation should be reserved for more shocking legislative transgressions of clear constitutional restrictions. The decision of tossing aside the work done by the legitimate representatives of the people--the supreme ruler--should be arrived at as an infrequent and painful remedy and in extraordinary circumstances invested with constitutional dimensions. Appellant's claim for privacy as opposed to the security of the State, does not have that dimension.

IV

Contemporaneous Vitality of the Constitution

A court should not abstain from making the constitutional law that the times demand. The great value of the Constitution of the United States as supreme instrument of Law is largely due to the legal thought of the judges who have undertaken its interpretation throughout two centuries. On his day,

each one faced the problems of his epoch. Their decisions, preserved for the ones that followed, enjoy the prestige of their intelligence analyzing and declaring the Law as they understood it. Nevertheless if any one element has influenced the development of Constitutional Law, it has been the free exercise of the creativity of judges who did not confine their adjudicative power to concepts already enunciated before them, nor did they lock it up in the conceptual prison of stare decisis. As in any other area, Constitutional Law precedents help to direct the thought of future generations, but not to fetter and paralyze the thought and the deliberative power at the moment in which they were produced. If North American constitutional criterion had come to a standstill, set on anachronical precedents, the nation would have not attained the political and personal freedom enjoyed by its citizens. That there is but one text of the Constitution, varied by the way it has been understood by different generations of judges, is evidence in the broadening of the concept of "due process" contained in the Fourteenth Amendment, which was originally proposed to guarantee fair trials for recently freed slaves and broadened to evaluate the constitutionality of state laws in areas such as electoral distribution and representation; the refusal of federal jurisdition to blacks because they were objects of private property protected by the

Fifth Amendment and not citizens (Dred Scott v. Sanford, 19 How. 393; 15 L.Ed. 691); the imposition on public school students of a salute to the flag ceremony against their religious beliefs, (Minerville School District v. Gobitis, 310 U.S. 586); the distinction between political and social equality under the "equal protection" of the Fourteenth Amendment which validated the separation of American citizens according to race in schools, theatres, trains, and other public places (Plessy v. Ferguson, 163 U.S. 537; 41 L.Ed. 256, 258) and the decision that judges were exempt from the payment of income tax which decreased their salaries. Evans v. Gore, 253 U.S. 245. Such varied pronouncements, some of which seem unusual to us today, responded to the judicial thought of the time, inevitably molded by ethical and moral concepts, and social needs of the time. The evolution of civilization and continuous progress and the new challenges to legal order, require a renewed constitutional law fit for our times, exercised freely and unencumbered by resonant precedents, some of great humanitarian content, but ineffective today to protect the Constitution from its critics. Democracy and freedom are not defended by swan songs or odes that had their time and place but that today are mere refrains for minstrels. The value of the Constitution lies in its vital content of

liberty which will last as long as judges who carry it in their heart discover its contemporaneousness.

I uphold the Act and the decision of the Superior Court.

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico,

Plaintiff and appellee

v.

Terry Terrol Torres Lozada,

Defendant and appellant

Appeal from the Superior Court, San Juan Part, Charles E. Figueroa, Judge

No. Cr-77-24

Violation of art. 404 of the Controlled Substances Act

Separate opinion of MR. JUSTICE MARTIN concurring in the Judgment and dissenting from the separate opinion of the numerical majority of the Court.

San Juan Puerto Rico, December 14, 1977

This case is mainly concerned with the protection of an individual's effects from unreasonable searches based on Section 10 of Article II of the Constitution of the Commonwealth of Puerto Rico, in the light of the corresponding provision contained in the Fourth Amendment of the Constitution

of the Commonwealth of Puerto Rico, in the light of the corresponding provision contained in the Fourth Amednment to the Constitution of the United States of America.

The legislation under our consideration has its origin in the determination made by the Legislature in its seventh special session which met in the summer of 1975,[1] in the sense that "It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law." And to the effect that "This has contributed greatly to an increase in the smuggling of firearms, explosives and narcotic drugs by this means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship.[2]

On the other hand we can take judicial notice of the fact that in United States airports where flights to Puerto Rico are originated no measures are taken to prevent passengers and crew members from bringing firearms, explo-

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[1] Act No. 22 of August 6, 1975, pp. 658-660, 25 L.P.R.A. §§ 1051-1054.

[2] Ibid, Statement of Motives, pp. 658-659.

explosives or controlled substances in their luggage.

The defenselessness of our borders is evident. The increase in criminality, mostly imported, evinced by the great number of crimes connected with unregistered weapons, as well as those related to controlled substances and explosives, forced the Legislature to take measures to effectively fight criminality through said Act 22 and consequently, to protect the security of and bring peace to the citizenry.

Said legislation authorized the Police of Puerto Rico to inspect baggage, packages, luggage and bundles of passengers and crew members landing at airports and docks of Puerto Rico from the United States and to examine cargo brought into the country to determine whether it contains firearms, explosives, and controlled substances not legally accounted for. Ibid. Act 22, sec. 1, 25 L.P.R.A. § 1051. In my opinion "reasonable grounds" are not required to believe that said luggage, etc. contains the forbidden articles mentioned. The "reasonable grounds" requirement is necessary with regard to searches of persons. If we were to understand that "reasonable grounds" are also required to search the above-mentioned articles as well as individuals, we would have to conclude that the Legislature was legislating in a vacuum, in other words, that it was performing a useless act, since Rule 231 of the Rules of Criminal Procedure

requires that searches be carried out only after a warrant has been issued by a magistrate before whom a statement had been made under oath or affirmation setting forth the facts tending to establish the grounds for issuing it. 34 L.P.R.A., App. II, R. 231. Rule 231 complies with the Constitutional precepts contained in Section 10 of Article II of the Constitution of the Commonwealth of Puerto Rico and in the Fourth Amendment of the Constitution of the United States which requires that orders authorizing searches, and arrests shall be issued by judicial order, and only when there is probable cause based on oath or affirmation describing the place to be searched in detail as well as the individual to be arrested or the object to be seized.

In spite of the constitutional provision mentioned there are circumstances in which the law authorizes a peace officer to arrest and search individuals, places or things without a warrant. Rules 11 and 12 of the Rules of Criminal Procedure, 34 L.P.R.A. App. II, R. 11,12. That may be the case: (1) when he has reasonable grounds to believe that the person about to be arrested has committed the offense in his presence, Id. R. 11(a), People v. Cruz Rivera, 100 P.R.R. 340 (1971); (2) when the person arrested has committed a felony, although not in his presence, Ibid. R. 11(b), People v. Gonzalez Rivera, 100 P.R.R. 650 (1972); or (3) when he has reasonable cause to believe that a person to be

arrested has committed a felony, whether or not said offense has in fact been committed. Ibid. R. 11(c).

The person authorized to carry out the arrest in these cases does not necessarily have to be a peace officer, since there are circumstances in which a private person may do so. The latter may arrest: (a) for an offense committed or attempted in his presence, or (b) when a felony has been in fact committed and he has reasonable cause for believing that the person arrested committed it. Ibid. R. 12, 32 L.P.R.A. App. II, R. 12. As we can see the arrest carried out by a private person is limited to stricter situations than when it is carried out by a peace officer.

Once the arrest takes place, even without a warrant, the peace officer may search the individual as well as the area under his control, when it is incidental to a lawful arrest. Gonzalez Rivera, supra. Our case law as well as that of the Supreme Court of the United States has recognized warrantless searches despite the constitutional provisions protecting the individual's right against unreasonable searches. Id.; United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

I have briefly described the cases in which the law and the case law have departed from the literal sense of the Fourth Amendment of the Constitution of the United States and of Section 10

of Article II of our Constitution, and have allowed warrantless searches in cases in which they are incidental to a valid arrest. I have not been able to find, however, an instance in which a search could be carried out without a lawful arrest. But I understand that there may be special circumstances to justify it. We are dealing with emergency legislation--Act No. 22. The statement of motives of this Act reveals the crisis the country is going through as a result of the crime wave which is greatly due to the ease with which weapons, explosives, and controlled substances are obtained and to the inevitable impunity with regard to the offenders. Under these circumstances I respect the wisdom of the lawmaker in displaying a legitimate concern over the helplessness and defenselessness of the executive branch, in view of the latter's inability to stop the continuous infiltration of the criminal objects mentioned in Act 22. Once they enter the country their dissemination is impossible to control. Never before was a Legislative action so justified for easing, though partially, the growing incidence of the aforementioned criminal acts.

I realize that the protection against unreasonable searches should be safeguarded but not when it affects the community. The core of the problem boils down to the constituents of a reasonable search. Reasonability should be judged according to the cir-

cumstances of the case to which it is applied, and which should only depart from the constitutional precept in cases strictly demanding it. I feel that this is one of those situations. The law itself requires that police intervention should be respectful and as brief as possible. No abusive act has been mentioned as to the way the defendant was stopped. The defendant was not searched. The search was limited to the two suitcases in which a bag of marihuana was found along with the pipe containing residues of said narcotic, and Two Hundred Fifty Thousand Dollars ($250,000) cash. We understand that in other cases narcotic substances worth millions of dollars have been found. See San Juan Star, December 2, 1977; El Nuevo Dia, December 2, 1977. We are dealing with a clear case in which a slight inconvenience to a passenger should yield to the welfare, security, health, and protection of the people in general who, in the absence of effective legislation, are at the mercy of consequences resulting from allowing smugglers of weapons, explosives and narcotics to shelter themselves beneath the protective cloan of unconstitutional prerrogatives, whose raison d' etre is based on the principle set forth in the preamble of our Constitution: We considered determining factors in our life . . . our faith in justice; our devotion to the courageous, industrious and peaceful way of life . . . and our hope for a better world. . . ."

Although the rule states in Miller v. California, 413 U.S. 15 (1973) and in Hamling v. United States, 418 U.S. 87 (1973) is not strictly applicable to the circumstances of this case, I find certain analogy there with the special circumstances that this country has to face as a result of the uncontrolled rise in criminality, different from other areas of the United States.

In the cases cited, the National Supreme Court had to decide on the right of the distributors of pornographic material in view of the alleged protection of the First Amendment of the Constitution of the United States barring Congress from adopting any law abridging freedom of speech or of the press. In Miller, upon weight the moral standards of the nation in general and of the community in particular with regard to obscene materials, the Court stated the following:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Main or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishlin v. New York, 383 U.S., at 508-509, the primary concern

with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one. [Citations.] We hold that the requirement that the jury evaluate the materials with reference to 'contemporary standards of the State of California' serves this protective purpose and is constitutionally adequate."
pp. 32-33.

The analogy to which we refer presupposes the distinction between Puerto Rico's unique situation and that of the other states which make up the nation and which are part of a single block. Our unique situation exposes us to an uncontrollable flow of the articles mentioned in the statute, without means to curb the same. We have tried to adopt a Weapons Law as strict as can be, as well as a Controlled Substances Act and an Explosives Act, which cannot be effectively administered in view of the overflow of illegally imported articles mentioned in Act No. 22. We can take judicial notice of the fact that in many States there is no effective weapons control, that is why they can be obtained in a

free market with relative ease. Since the United States is one of the greatest weapon producers in the world, any one may have easy access to them. In view of this fact the Puerto Rican people should be protected, and it is incumbent upon the Legislature to do so in an effective manner.

Since I feel that the Legislature acted within its constitutional authority in approving Act No. 22 on August 6, 1975 and that the search of the defendant's luggage is in accordance with the standards of reasonability as determined by the legislator after considering the defenseless situation against criminality that our country undergoes, I agree with the judgment of the Court affirming the judgment appealled and dissent from the separate opinion signed by the numerical majority of the Court.

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico Plaintiff and appellee v. No. Cr-77-24 Terry Terrol Torres Lozada, Defendant and appellant	Appeal from the Superior Court, San Juan Part, Charles E. Figueroa, Judge Art. 404, Controlled Substances Act

Opinion of MR. JUSTICE NEGRON GARCIA.

San Juan, Puerto Rico, December 14, 1977

The case at bar demands ". . . the composure [necessary] to fuse the rights of the individual which if unrestrained could be conflictive among themseleves and the right of the community--represented by the Legislature--to life, health, and welfare." 4 Diario de Sesiones de la Convención Constituyente (Journal of Proceedings of the Constitutional Convention) 2576 (1961 ed.). The constitutionality of Act No. 22 of August 6, 1975 (25 L.P.R.A. § 1051) is questioned. The purpose of said Act which seeks the

general welfare of the people is clearly established in its Statement of Motives:

> "Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.
>
> "It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law. The Federal Government does not require these passengers or crew to go through the Customhouse after arrival in the Island for inspection of their luggage or person. This has contributed greatly to an increase in the smuggling of firearms, explosives, and narcotic drugs by this [sic] means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship [sic].
>
> "The inspection of luggage, cargo and persons to reduce the introduction of firearms, explosives, and narcotic drugs illegally brought from the

> United States to Puerto Rico is a legitimate area of control on the part of our government in exercising its police power, especially when the same is not covered by the Federal Government, and there is no conflict of authority on this matter between both governments."

Upon drafting this opinion the following thought comes to our mind: "nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times." Cardozo, cited in Government of the Capital v. Executive Council, 63 P.R.R. 417, 427-28 (1944.)

With this in mind, we want to state our conviction that said Act is constitutional insofar as it authorizes the police of Puerto Rico to conduct routine inspections of luggage and cargo at the airport--without being tied down to classical reasonable grounds tests--seeking to curb the entry to the country of three articles, which in their varied froms and illegal modalities, are excluded from Puerto Rican, State and federal legal commerce, to wit: weapons, explosives, and controlled substances.[1]

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[1]We have no doubt and therefore we will not discuss our view that under this legislative piece, which makes the search of an individual legal, it is necessary that there be "reasonable grounds" according to our case law doctrine.

We must immediately clarify that this case does not deal with the search of an individual, but with the inspection at the airport of a suitcase containing marihuana which was to be introduced into the country. The inspection was carried out when the behavior and appearance of the appellant--who arrived from Miami, Florida, at Isla Verde International Airport--caught the attention of police agents on duty at said air terminal. As a result thereof he was convicted under the Controlled Substances Act (24 L.P.R.A. § 2404); the constitutionality of said search is questioned before this Court.[2]

I

We must admit that both Art. II, Sec. 10 of our Constitution as well as the Fourth Amendment of the Constitution of the United States, guarantee the people's right to be protected against unreasonable searches. Nevertheless, not every search or inspection violates this basic guarantee.

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[2]We note that appellant does not question or suggest that police officers physically abused or mistreated him while discharging their duty.

First of all, several federal laws and court decisions authorizing searches of individuals and luggage without probable cause constitute persuasive precedents. Some of them permit the searches if there is suspicion; others do not impose any restriction. An example of the latter is sec. 287(a) of the Immigration and Nationality Act (8 U.S.C. § 1357(a)). Under this provision, in Almeida-Sánchez v. United States, 413 U.S. 266 (1973), although the Supreme Court invalidated a search conducted 20 miles from the border between Mexico and the United States--under the hypothesis that there was no consent nor probable cause to carry it out--it distinguished this search from the routine search and inspection conducted at the border, sustaining the legility of the latter.

Likewise, custom and tax laws contain several provisions for inspection and search, some requiring "probable cause to suspect" and others exempt from this requirement. See: 19 U.S.C. §§ 482, 1461, 1467, 1496, 1581, and 1582. In United States v. Ramsey, of June 6, 1977 (45 L.W. 4577), the Supreme Court sustained the legality of the search of some letters pursuant to the aforementioned sec. 482, which authorizes the search of envelopes when there is probable cause suspect that they contain articles introduced illegally into the country. The inspection of said letters was carried out by a customs agent assigned to the New York City Post Office, who upon seeing 8 envelopes coming from

Thailand, suspected they contained smuggled goods because of their bulky aspect. The court, recognizing that the "reasonable cause to suspect" test is less demanding than that of probable cause under the Fourth Amendment, considered the search legal because in its opinion it was a border search. As to this particular it stated:

> "That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."

In its decision the court reaffirmed that border searches without warrant are reasonable within the meaning of the Fourth Amendment; nevertheless it distinguished these searches from those carried out in interstate travel. Although the Supreme Court has thrice reiterated this distinction between interstate travel and travel outside the states, it has, however, avoided review of the legality of searches of passengers boarding planes in the United States for flights both inside and outside the United States.

These searches have been conducted in the nation's airports for more than

seven years. At the beginning this practice was authorized by rules adopted by the Federal Aviation Administration. In 1974 Congress legislated to grant statutory approval to these rules. (49 U.S.C. §§ 1356 and 1357.) These rules sought to prevent the boarding of commercial airplanes by passengers carrying weapons or explosives, in order to reduce skyjacking possibilities. We must point out that formerly, individuals who were to be searched had to first activate a magnetometer (metal detector) and they had to present some of the characteristics of a skyjacker's profile. At present, these elements as well as others required by courts are not considered determining to the legality of the search. To that effect, in United States v. Doran, 482 F.2d 929, 932 (1973), and United States v. Skipwith, 482 F.2d 1272, 1276 (1973) the profile was discarded as a decisive factor; in United States v. Fern, 484 F.2d 666 (1973) a search based on suspicions without the use of a metal detector was deemed legal. In Skipwith, supra, the express consent requirement for the search was elminated when the court held that those who arrived at the boarding area, as well as those seeking entrance to the country are subject to a search based on mere or unfounded suspicion. The following was also mentioned: rules for searching an individual arriving at the boarding area should not be more demanding than those applied at the country's borders; reasonability does not require that at boarding areas the only

persons searched be those who respond to the skyjacker's profile or those who appear to be nervous or suspicious.

It is significant that two of the cases that the Supreme Court refused to review held that searches at airports are analogous to border searches with regard to the requirements of the Fourth Amendment. United States v. Cyzewski, 484 F.2d 509 (1973), cert. denied, 415 U.S. 902; United States v. Moreno, 475 F.2d 44 (1973), cert. denied, 414 U.S. 580. Individuals in these cases acted suspiciously and the searches conducted produced narcotics. In Cyzewski the narcotics were found in a suitcase which was searched after it had been accepted and was under the airline's control.

The above stated suffices to have anyone agree with the statements in United States v. Edwards, 498 F.2d 496 (1974) to the effect that there seems to a consensus among the Circuit Courts as to that searches in airports should not be forbidden under the Fourth Amendment merely because they do not fall under the previously acknowledged categories which are exempt from the warrant requirement.[3]

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[3] See other cases in "Validity", Under the Federal Constitution, of Preflight Procedures Used at Airports to Prevent

II

The foregoing analysis shows different cases where the Fourth Amendment does not represent an obstacle to searches conducted

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Hijacking of Aircraft," 14 A.L.R. Fed. 286 (1973). See United States v. Lopez, 328 F. Supp. 1077, 14 A.L.R. Fed. 252 (1971), and United States v. Davis, 482 F.2d 893 (1973), with regard to administrative and statutory measures and procedures in effect in said cases.

We must clarify that federal legislation on hijacking adopted in 1974 is not discussed in any of the cases considered. Under 49 U.S.C. § 1357(b) the Federal Aviation Administration should set up rules requiring airports to provide peace officers to protect passengers against criminal acts and hijacks. Under 49 U.S.C. §1472(1)(I) it is considered an offense if a person carries or attempts to carry dangerous weapons hidden in accessible places during a flight or who intends to place or places explosives on a plane. Under Paragraph (1) (3) of this section this does not apply to weapons contained in unaccessible suitcases that have been reported to the airline. Under 49 U.S.C. § 1511(a) the Administrator must require, through regulations, that an airplane refuse transportation to passengers or property when the passengers do not agree to the search of their persons or their property. Under paragraph (b) of this section the transportation contract is supposed to include an agreement to the effect that transportation

by federal customs agents at entry points outside the country. Neither does it bars searches conducted by airline agents, or by state or federal agents of passengers, cargo, and luggage before boarding commerical flights.

In view of the mobility of the population and of the modern means of transportation and communication, searches of the type described above have become generalized to the point that individuals entering the nation and those boarding planes on the nation know and realize they have no expectation of privacy in these cases. As the Supreme Court said in United States v. Thirty-Seven Photographs, 402 U.S. 363, 376:

> ". . . a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old

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will be denied when said consent is not given. In United States v. Fannon, of June 5, 1977, 46 L.W. 2049, the Court of Appeals sustained the validity of a cargo search, pursuant to § 1511(b), in which heroin was found.

practice and is intimately associated with excluding illegal articles from the country."

In view of the previous statement, let us see if this minimum expectation for privacy is identical or acquires new proportions when searches are carried out under state legislation.

The state power to establish inspection laws has been accepted by the Constitution as well as by the case law of the Federal Supreme Court. Article 1, Sec. 10, paragraph 2, of the Constitution of the United States, insofar as pertinent provides:

> "No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . ."

Already since the famous Gibbons v. Ogden, 9 Wheaton 1, 203, 6 L.Ed. 23 (1824), the Supreme Court spoke in the following terms with regard to state power over inspection laws:

> . "But the inspection laws are said to be regulations of commerce, and are certainly recognised in the constitution, as being passed in the exercise of a power remaining with the states. That inspection laws . . . form a portion of that immense mass of legislation,

> which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass."

The observation of the Supreme Court copied above acknowledges that the constitutional provision not only establishes the right of states to adopt inspection laws, it tacitly grants the right to prohibit exportation and importation of certain articles. Obviously this right to prohibit includes dangerous or hamful articles.

In this context we should remember that Act No. 22, attacked in this case, is an inspection law which authorizes the examination of luggage with the purpose of enforcing our statutes controlling weapons, explosives, and drugs.

The state's power to remove and destroy explosives under police power and possibly under inspection laws was accepted in the opinion of the Supreme Court delivered by Justice Marshall in Brown v. Maryland, 12 Wheaton 419, 443, 6 L. Ed. 678, 687 (1827), when the following was stated:

> "The power to direct the removal of gunpowder is a

branch of the police power, which unquestionably remains, and ought to remain, with the states . . . We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power . . . ."

And commenting on police and state inspection powers in the Mayor of the City of N.Y. v. Miln, 11 Peters 102, 139-142, 9 L. Ed. 648, 662-664 (1937) one undoubtedly notes:

". . . That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends.... That all those powers . . . what may, perhaps, more properly be called internal police, are not thus surrendered or restrained;

and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

. . . . . .

". . . We suppose it to be equally clear, that a state has as much right to guard, by anticipation, against the commission of an offence against its laws, as to inflict punishment upon the offender, after it shall have been committed. The right to punish, or to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his foot upon the soil of the state, is just as subject to the operation of the law, as one who is a native citizen.

. . . . . .

" . . . The power to pass inspection laws, involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound or infectious, to cause them to be removed,

> or even destroyed. But the power to pass these inspection laws, is itself a branch of the general power to regulate internal police."

We have no doubt as to that state police power is equal to that of a sovereign nation; that inspection laws are part of this power; that these laws include the power of inspection, removal, and destruction; that police power embraces crime prevention even with regard to people coming from abroad.

The power of inspection also covers the power to inspect articles coming from other states. This was sustained by the Supreme Court in Patapsco Guano Co. v. Board of Agriculture, 171 U.S. 345, 357 (1897) upon stating:

> "Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the execise of that power of self-protection commonly called police power."

Said Court has also acknowledged the power of the states to forbid the introduction of articles that are not in legal commerce. In Compagnie Francaise v. State Board of Health, Louisiana, 186 U.S. 380, 391 (1902),

the Court reiterated the standard stated in several cases:

> ". . . it was held that a state law absolutely prohibiting the introduction, under all circumstances of objects actually affected with disease, was valid because such objects were not legitimate commence . . . . . the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce."

The most recent case reaffirming state power to adopt inspection laws is California v. Thomson, 313 U.S. 109, 114 (1941), which holds that the states may adopt inspection laws applicable to articles in interstate commerce as long as said laws do not substantially obstruct or discriminate commerce and Congress has not occupied the field. We must emphasize that nobody questions whether the inspection of the luggage of a passenger arriving at Puerto Rico is a matter on which Congress has legislated; the Federal Government has not occupied the field in the area assigned to the Police of Puerto Rico.

Only two months ago the Supreme Court through a summary action denied an appeal questioning the inconstitutionality of an inspection law of the State of Florida as to (1) the authority it

granted to stop transporters on state roads for inspection of agricultural products without there being probable cause or suspicion that they were carrying agricultural products, and (2) the authority to conduct a search both unreasonable and contrary to the right of privacy and the right to travel freely. The appeal is summarized in 46 L. W. 3005 and denied in 46 L. W. 3130 (Session of October 3, 1977). The case sustains that "appellee has full authority under the police power of the State of Florida to conduct agricultural inspection of the vehicles" and it ends saying: "It is our view that the requirement of the foregoing statute that all trucks and trailers stop at the inspection stations of appellee for agricultural inspection is entirely reasonable and is a valid exercise of the police power of the state." Stephenson v. Dept. of Agr. & Consumer Services, 342 So.2d 60 (1977).

The principles stemming from the commented case law, briefly merged and organized, establish the following: the state's Police Power is like that of sovereign nations, and it embraces: a) the prevention of crime even as to foreigners entering the state; b) the revision and destruction of explosives; and c) the prohibition of entry of article excluded from legal commerce. In short, inspection laws derive from this police power and include such powers as the power to search without probable cause and to restrict and to forbid the entry of articles from other states, as long as said laws do not discriminate

or obstruct interstate commerce substantially.

In view of the foregoing principles, the authority of the States with regard to their police power and power to inspect is clear. Said powers authorize the States to inspect suitcases and cargo coming from other states in order to seize weapons, explosives and narcotics with the purpose of protecting against threats to health, welfare and state security.

III

According to our Constitution, police power and powers of the Commonwealth to inspect are certainly not inferior to those of the states of the Union. In Examining Board v. Flores de Otero, 426 U.S. 572, 594, 597 (1976), the Supreme Court acknowledged that the Congressional purpose in the legislation of years 1950 and 1952 was to grant Puerto Rico the degree of autonomy and independence normally associated with states of the Union; but said court also observed that Puerto Rico's relationship with the United States has no parallel in the history of the nation. Id., 596.

This unparalleled relationship may entail, as in fact in entails, that Puerto Rico has the prerogative and powers that the federal Constitution denies to the states of the Union. As an example, under section 3 of the Federal Relations Act, Puerto Rico has

the power to impose duties on imports, a power denied to the states, paragraph 2 section 10 of the Constitution. And then under sections 9, 38 and 58 of said law, not all federal laws necessarily apply to Puerto Rico. Particularly tax laws and those of interstate commerce, as well as those in conflict with the Federal Relations Act are inapplicable. The states, on the other hand, cannot escape the application of federal laws because they are part of the supreme law of the nation. Barton v. United States, 202 U.S. 344, 368 (1906).

Besides, Puerto Rico has a tacit power for inspection and search that states do not have and it is derived from the power to lay taxes on imports.

This power to lay taxes on imports is identical to that of the federal government over imports in the nation. By virtue of this authority the Supreme Court has acknowledged that custom agents have authority at borders not only to enforce tax laws, but to control the introduction of smuggled goods and illegal material into the nation. As to the border search or its functional equivalent, the analogy and judicial consequences are unavoidable.

The Federal Relations Act has tacitly granted Puerto Rico equal authority at island borders to inspect and search. Section 3 of said law, after authorizing tax on imports instructs, "officials of the Customs and Postal Services of the United States . . . to assist the appropriate officials of the Puerto Rican

Government in the collection of these taxes."

The "assistance" referred to in the provision is certainly not related to administrative aspects (appraisal, execution, etc.) of the collection of taxes, but to the areas of inspection and search, which are those under the control of post office and customs inspectors. If the duty and obligation of federal agents is to aid and assi local officials in inspections and searches, this necessarily implies the existence of a power in the Commonwealth to conduct inspections and searches; as corollary Puerto Rico has the power to conduct said searches without necessarily relying on federal assistance.

In view of the above statement, is is clear that Puerto Rico has a power to inspect and search at its borders identical to that of the states of the Union in their corresponding borders; and that besides, it has a power that is analogous to that of federal custom agents at the nation's borders. By virtue of each of these powers Puerto Rico derives the power to authorize the search for weapons, explosives and narcotics in cargo or luggage belonging to passengers arriving from the United States regardless of the reasonable grounds standards.

IV

Not one of the decisions of the highest court in the federal jurisdiction is contrary to the conclusions stated, not even taking into account Carroll v. United States 267 U.S. 132 (1925);

Almeida-Sánchez v. United States, supra, and United States v. Ramsey, supra, which reiterate the "distinction between internal searches within the nation which require probable cause and border searches."

This standard, at first glance, seems to be contradictory but it is not. Upon analyzing and applying case-law guidelines we cannot depart from the context in which they were stated and apply them blindly and mechanically to circumstances not contemplated when they were rendered. In Carroll, Almeida, and Ramsey federal agents and laws were involved. Carroll dealt with inspectors authorized to search vehicles for seizure of alcoholic beverages. An automobile was searched because its occupants had earlier tried to furnish them with alcoholic beverages; they had reason to believe they were transporters of intoxicating liquors; and it came from Detroit which was known as a center of introduction of alcoholic beverages into the country. The Court felt that said events constituted probable cause under the Fourth Amendment and that a search warrant was unnecessary.

Almeida and Ramsey, as we have seen, dealt with federal agents for customs and immigration, both having authority to conduct searches at national borders. The court acted correctly in applying the distinction between border searches and internal searches to these cases, since the authority vested in these agents to conduct searches is limited to the border, and they are not authorized

to search within the nation. Alcoholic beverage agents in Carroll, on the contrary, had authority to search in any part of the nation. The court feared that this federal power would be used in an indiscriminate manner to conduct searches in all parts of the country and therefore imposed the restriction on the searches so they could be conducted when there existed probable cause to believe that liquor was being transported.

It appears then that in the cases mentioned the court was dealing with federal agents and laws and it was with regard to said laws and agents that the court issued its pronouncements. State authority to conduct searches and inspections at its borders was not involved. This authority has not been at issue in any Supreme Court decision related to the Fourth Amendment.

With regard to this state authority at borders, the statements by the court itself in Carroll and recently repeated in Ramsey are pertinent to the effect that:

> "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interest as well as the interests and rights of individual citizens." 267 U.S. 149 and footnote 14 in Ramsey.

The first ten amendments were proposed to the nation two years after the approval of the Constitution in 1787 and were ratified by various states on the years that followed. When said amendments were proposed state power for search and inspection was well known since it is a power that the Constitution itself acknowledges. This power was acknowledged by the Supreme Court in Gibbons v. Ogden, supra, three decades after the ratification of the first ten amendments by several states. It is evident, therefore, that if the Fourth Amendment is to be construed in the light of what was considered reasonable when it was adopted, said amendment cannot be interpreted nowadays in the sense that it confers an unreasonable character to state inspections and searches of luggage at airports and docks to control smuggling and dissemination of weapons, explosives and controlled substances on the country. "The Fourteenth Amendment is not a pedagogical requirement of the impracticable." Holmes, O. W., Dominion Hotel v. Arizona, 249 U.S. 265, 268 (1919).

We have seen that the Supreme Court has never required that state border inspections be conducted only when there is probable cause under the Fourth Amendment. We are very much in doubt that the Court will impose this requirement in the future since its state border inspections seek the same end that national border inspections do and said demand would have the effect of making this power for inspection inoperant.

On the other hand, authorized searches to seize weapons and explosives upon boarding airplanes strenghten our conclusion, since they establish another exception to the dogma against searches during interstate travel. Besides, said searches have the effect of eliminating the expectancy of privacy on the part of passengers about to board airplanes. Not only do they eliminate said epectancy, but the law presumes that consent exists for the search of persons and baggage boarding commercial flights. (49 U.S.C. 1511). If passengers have agreed to the search, the invasion of privacy is minimum and slight, when the search is conducted, as well as when passengers leave the plane.

We must know that although in United States v. Chadwick, decided on June 21, 1977, 45 L.W. 4797, the Supreme Court held that the privacy expectancies in luggage are greater than those existing with regard to an automobile, it also stated that baggage may be exposed to public view as a requirement for entry at borders or when traveling on a vehicle. The latter validates searches of suitcases belonging to individuals traveling on commercial airplanes.

Although the Supreme Court has not required that state inspections be justified, based on an urgent need, the search authorized by Act No. 22 satisfies this standard.

With regard to firearms and explosives, Puerto Rico's sitution is unique.

Due to the continuous threat to our internal security, the Legislature has adopted strict laws regarding possession, carrying, and sales of firearms, as well as sales and transportation of explosives. (25 L.P.R.A. § 411 et seq.) These laws have not served their purpose. One of the main reasons for this failure was that the illegal entry of weapons and explosives from the United States had not been controlled. Act No. 22, at issue in this case, sought to ward off this evil.

The smuggling of weapons in Puerto Rico increases the number of illegal weapons. In 1974, the number of illegal weapons was thought to be more than two-hundred and fifty-thousand, without taking into consideration those legally registered which were calculated at around 100,000.[4] Most of these weapons, illegally possessed, are in the hands of individuals connected with the underworld and have been brought from the United States. These figures are alarming, since the male population of Puerto Rico is of about one and a half million people.

Contrary to Puerto Rico's public policy, the possession and carrying of

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[4]Reports by the Commission for the Study of the Police presented to the Council for the Reform of Justice on January 23, 1974, p. 126.

weapons in the United States was traditionally considered an inalienable right of the people. This right was so deeply rooted when the nation was born that it was incorporated into the Constitution by way of the Second Amendment, which provides that "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

In United States v. Miller, 307 U.S. 174 (1939) the Supreme Court, seeking the roots of this constitutional amendment found that when it was proposed there were state laws which provided for a civil militia which required that people bear arms of their ownership. Nevertheless, the Supreme Court in view of the needs of our times has practically nullified the scope of this amendment. In Miller, the court sustained that the federal Weapons Law of 1934 could not constitute an assumption of state powers and it also stated that when lacking evidence to that effect, the argument that the weapon had any relationship whatsoever with an organized militia according to the Second Amendment could not be sustained. Before Miller, the doctrine existed to the effect that the Second Amendment constituted a prohibition against the federal government but not against state governments which had extensive powers to ban weapons. See People v. González, 36 P.R.R. 222 (1927) and People v. Díaz Cintrón, 36 P.R.R. 514 (1927).

In view of the shocking increase in the criminality rate of the nation in recent years, Congress determined that the ease with which states authorize the possession and sale of weapons could no longer be tolerated and in 1968 it enacted the Gun Control Act which channeled the sale of weapons through licensed firearms dealers and forbade the sale of weapons to certain individuals, or when the sale is contrary to a state law.

Upon the adoption of this Act the Congress determined that violent criminality in the United States was due mostly to the ease with which weapons could be obtained; that there was a widespread traffic in firearms and that these were available to persons whose possession was contrary to the public interest. The purpose of the 1968 Act was to curb crime by keeping weapons away from the hands of incompetent individuals and of those with a criminal background. For the legislative history see Huddleston v. United States, 415 U.S. 814, 824-829 (1974). See also note 11 in Scarborough v. United States, decided on June 6, 1977 (45 L.W. 4570), where it was held that Congress found that state laws were not adequate for forbidding the possession of weapons by individuals who would probably use them for illegal purposes; and that Congress intended to contribute to the state's efforts. See also, Barret v. United States, 423 U.S. 212 (1976).

The federal law on Gun Control (18 U.S.C. §§ 921-928) extends its

application to Puerto Rico and its Statement of Motives is embodied in § 921. Among the prohibitions set forth in said law with regard to weapons in interstate commerce, the traffic is limited to licensed firearms dealers and the transport and receival of weapons by individuals who obtain them outside of the state of residence is forbidden. The sale of weapons to persons accused of felonies, to fugitives, drug addicts and persons with mental defects is also forbidden. The law clearly states that its purpose is not that of pre-empting state legislation on the matter. In its § 923 it authorizes inspections of the premises of any firearms or ammunition importer, manufacturer, or dealer. In United States v. Biswell, 406 U.S. 311 these inspections were validated. The Court decided that a search warrant is not necessary when the law authorizes a regulatory search; this inspection contributes to an urgent federal need; and the possibilities of abuse and threat to privacy are not of an impressive dimension. It also stated that if the law is to be complied with and the inspection made effective, an inspection without a warrant should be considered reasonable according to the Fourth Amendment. With regard to interstate traffic of firearms, it stated:

> ". . . but close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms

traffic within their borders . . . . . Large interests are at stake, and inspection is a crucial part of the regulatory scheme . . ." (Underscore supplied).

V

The pronouncements of the Supreme Court with regard to weapons traffic and inspections, are particularly interesting in the case of Puerto Rico. Our Act only authorizes the carrying and transportation of weapons by particular citizens under two specific circumstances and in both cases the person must obtain the license in advance at the Superior Court. The first is when a person carries money, while in the act of transporting it (25 L.P.R.A. § 430(b) 6); and the second is when a risk of death or serious bodily injury is established (25 L.P.R.A. § 431).

If our law is to be complied with, the inspection of suitcases and packages from the United States at airports and docks is imperative. If not, our law would continue being ineffective and the shocking use of weapons in felonies against the person and his property and its dissemination among individuals of the underworld would continue. The introduction of weapons into Puerto Rico by individuals not authorized to do so is illegal according to our law as well as to the federal law. Both our government and the Federal government consider the prevention of this evil an urgent

need. The Fourth Amendment was not adopted to impose intellectual nearsightedness on the states in handling the serious problems that threaten their internal security. The Supreme Court itself acknowledged that the inspection system provided by the federal law is an essential element to enforce this law.

Likewise, the inspection in search for drugs, represents another effort by Puerto Rico to avert an evil which is destroying the foundations of our society. There is a close relationship between the traffic and use of narcotics and the rise in criminality throughout the country. The common citizen no longer feels safe in his home, in his car, nor when walking through the streets; but not because of the use and traffic of narcotics in itself, but because of the carrying and use of lethal weapons by individuals related to their illegal commerce. The attention caught by the criminal aspects of the traffic and use of narcotics has diverted the knowledge of the true finality of laws on drugs, whose objective is preventing their use because of the threat to public health. We have seen, when discussing state power to inspect, that the protection of public health is a valid constitutional exercise of this power.

Finally, constitutions as well as laws should respond to the social realities they serve. When, due to rigid interpretation full of abstract theories, there is a gap between reality and legal

precepts, the utility of the constitutional document is paralyzed. "The most liberal protection of individual rights established . . . in the Bill of Rights, cannot disregard the basic principle that the health of the people is the supreme law. Individual rights have to be understood within the general picture of society according to the limitations of life in common." Journal of the Constitutional Convention, op. cit., 2576. I am convinced that in the conflict between private individual value and public communitary value in the instant case, the latter should prevail as it was conceived by the Legislature and authorized by the constitutional structure in force.

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico, Plaintiff and appellee v. No. Cr-77-24 Terry Terrol Torres Lozada, Defendant and appellant	Judgment of Charles E. Figueroa, Judge, Superior Court, San Juan Part Article 404, Controlled Substances Act

JUDGMENT

San Juan, Puerto Rico, December 14, 1977

The search of appellant's belongings being based on the provisions of Act No. 22 22 of August 6, 1975, and considering the absence of the majority vote required by the Constitution to annul said Act,(*)

(*)Article 5, Sec. 4, provides:

"The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law."

the judgment appealed is affirmed. Mr. Justice Rigau took no part in this decision. Mr. Justice Irizarry Yunqué delivered an opinion based on the unconstitutionality of said law. Mr. Chief Justice Trías Monge and Mr. Justice Dávila and Torres Rigual concur with said opinion. Mr. Justices Martín, Díaz Cruz, and Negrón García rendered separate opinions establishing the legality of the search and the constitutionality of the law.

It was so decreed and ordered by the Court and certified by the Chief Clerk.

Ernesto L. Chiesa
Chief Clerk

APPENDIX C

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

THE PEOPLE OF PUERTO RICO	CRIMINAL NO. G76-3105
V.	RE:
TERRY TERROL TORRES LOZADA	CONTROLLED SUBSTANCES ACT

RESOLUTION AND ORDER

BRIEF STATEMENT OF THE CASE

That defendant, Terry Terrol Torres Lozada, was charged with a violation of art. 404 of the Controlled Substances Act--possession of the controlled substance known as marihuana on August 6, 1976, at the Isla Verde International Airport--after the Police of Puerto Rico searched his suitcases pursuant to the provisions of Act No. 22 of August 6, 1975, which allows the inspection of luggage, packages, bundles, and bags of passengers and crew members arriving at the airports and piers of Puerto Rico from the United States.

The hearing for the case began on October 26, 1976, and lasted until the next day, when the government rested its case, which consisted in the testimony of agent Rubén Marcano, of the Criminal

Investigations Bureau, and the testimony of Mr. Héctor L. Torres, Chemist of the Criminal Investigations Laboratory of the Puerto Rico Police Department, which was stipulated.

When the government offered into evidence the objects seized in one of defendant's suitcases, to wit: a foil-lined white paper bag labeled "Pepperidge Farm" containing "picadura"* and a black cloth bag with the word "Prominence" printed on it, which contained a brown wooden pipe and a black mouthpiece, with residues on its inner walls, the defendant objected to their admission into evidence because he understood that they had been seized in violation of the Fourth Amendment of the Constitution of the United States and of Art. II, Sec. 10, of the Constitution of the Commonwealth of Puerto Rico. He also contended that if agent Rubén Marcano had acted essentially on the authority granted by Act No. 22 of August 1975, this act was unconstitutional from its face because it was against the constitutional provisions mentioned above.

After hearing oral arguments on the question of law raised, the court decided to issue the resolution on the question

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*[Translator's Note: "Picadura" is a shredded or shag-like substance. It may refer either to tobacco shag or to cut marihuana.]

raised after the parties had presented their arguments in writing in their respective memorandums of authorities, because it understood that the question was one of first impression and of great importance. The memorandums of authorities have been submitted by the parties and considered by the Court.

On the basis of the evidence offered, admitted, not contested, and believed, the Court makes the following

FINDINGS OF FACT

On August 6, 1976, Mr. Terry Terrol Torres Lozada arrived at the International Airport of Puerto Rico from Miami on board Eastern Airlines flight No. 915. Upon his arrival at the airport's baggage claim area, defendant Terry Terrol Torres Lozada seemed somewhat nervous, followed with his eyes the movements of agent Rubén Marcano, who was on duty at the International Airport wearing full uniform and carrying his service revolver at that checkpoint for passengers coming from the United States.

Agent Marcelino Santiago, of the Criminal Investigations Bureau's Division of Search and Patrol of Ports and Airports was in the aforementioned place in civilian clothes, that is, he was not wearing his uniform that day while he was on duty and, upon noticing Mr. Torres Lozada's attitude, advised agent Marcano of the same. Agent Marcano confirmed this information.

When Mr. Torres Lozada picked up his baggage and was about to leave the baggage claim area with it, he was stopped by agent Santiago, who showed him his identification card as agent of the Criminal Investigations Bureau (C.I.B.), and a card with information on Act No. 22 of August 6, 1975. At this moment, agent Marcano approached them to continue the routine investigation, and asked Mr. Torres Lozada to accompany him with his luggage to the Criminal Investigations Bureau's (C.I.B.) office at said air terminal, to which the former agreed after being shown the provisions of Act No. 22 of August 1975 contained in a card provided by the Puerto Rico Police Department.

Once inside the C.I.B.'s office, agent Marcano allowed defendant Torres Lozada to read the card. When asked if he had understood what the law said, defendant answered in the affirmative and asked that he be permitted to call his attorney. The agent told him that since no offense had been committed yet, there was no need for an attorney. He was also told that if it appeared that he had committed an offense, he would be allowed to call his attorney, and if he had none the State would appoint one for him. Defendant insisted on calling his uncle, attorney Celedonio Medín Lozada, in Mayaguez. Agent Marcano repeated that he would have the right to communicate with his attorney if it appeared that he had committed an offense; he was told that it was only

a routine baggage search, like that of all passengers inspected pursuant to Act No. 22 of August 6, 1975.

At this moment, Mr. Torres Lozada agreed to the inspection of his suitcases and opened the combination locks on the same. As a result of the inspection made, a paper bag containing cut marihuana was seized from defendant's luggage, for which reason he was immediately arrested. Agent Marcano continued to search the luggage and seized a smoking pipe containing marihuana residues and a considerable amount of money in bills of different denominations.

At the hearing for the case, agent Marcano testified that he is familiar with different kinds of controlled substances, including marihuana, because he has been trained on this and he had worked for the Narcotics Division of the Puerto Rico Police Department for approximately two and half years. The evidence seized by agent Marcano was analyzed by chemist Héctor L. Torres, of the Criminal Investigations Laboratory of the Puerto Rico Police Department, who determined that it was cut marihuana.

Agent Marcano also stated that, at the Isla Verde Airport there are warnings informing arriving passengers that their luggage may be inspected under Act No. 22 of August 6, 1975, that there are no similar warnings in the airplanes and that he thinks, although he cannot categorically assert it, that there are no

warnings regarding the effectiveness and scope of Act No. 22 of August 1975 in the airports from where the airplanes depart on their domestic flights. That his intervention was partly due to the defendant's conduct and to the way he was dressed, but was rather based on the authority granted by Act No. 22 of August 1975, and that the defendant was not a suspect.

Considering the foregoing findings of fact, the Court has arrived at the following

CONCLUSIONS OF LAW

Act No. 22 of August 6, 1975, provides the following in its first section:

> "The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States, to examine cargo brought into the country and to detain, question, and search those persons whom the police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances."
> (Underscore supplied.)

We should then immediately decide if said Act, in its wording and content, requires that there be previous grounds for an agent to inspect a passenger's luggage when he disembarks at any airport or dock of Puerto Rico from the United States.

A careful reading of that first section of the Act herein attacked as unconstitutional convinces us that the purpose of the lawmaker when drafting and enacting it was not to require the law enforcement officer assigned to these functions to have previous reasonable grounds to justify the inspection or checking of the luggage, packages, bundles, and bags of the passengers and crew members who arrive at the airports and docks of Puerto Rico from the United States. Reasonable grounds are indeed required, matching Rule 11 of the Rules of Criminal Procedure, when the agent intends to stop the passenger himself, when the agent intends to detain, interrogate, and search the passenger because he is believed to be illegally carrying firearms, explosives, controlled substances, depressants or stimulants or similar substances about his person.

Defendant asks us to decide that the reasonable grounds requirement of said Act be extended to baggage searches of passengers arriving at a Puerto Rican airport from the United States, as in his case, because he understands that this is the only fair, reasonable

interpretation of Act No. 22 of August 6, 1975 under the provisions of the constitutional guarantee of the Fourth Amendment of the United States Constitution and Article II, Section 10, of the Constituion of the Commonwealth of Puerto Rico.

We cannot agree with defendant's position. The law in question is clear as to its motives and the ends it pursues and neither its wording or its content is ambiguous or subject to judicial interpretation. It is our opinion that under this act, the reasonable grounds requirement only has to be met when the agent intends to detain and eventually search the passenger, not his luggage. If we were to decide on the contrary, this Court would be legislating through judicial fiat, and this the Constitution precludes us from doing. This function pertains to another branch of government, to wit, the Legislature of Puerto Rico.

It is thus held that said act does not require the agent to have reasonable grounds to inspect the luggage of a passenger or crew member coming from the United States who disembarks at a port or airport of Puerto Rico. In the instant case, it is also held that defendant's conduct, as observed by agent Marcano, and the information received from agent Santiago, do not constitute, in our judgment, the reasonable and supported grounds required of a law enforcement officer to justify, ordinarily, the arrest of a citizen in accordance with our case law, but we can consider it suspicious conduct that could justify a

border search, in accordance with some cases in the federal case law.

We shall now determine if this first section of the act is unconstitutional because it contravenes the Fourth Amendment of the United States Constitution and Article II, Section 10, of the Constituion of the Commonwealth of Puerto Rico upon authorizing the inspection of luggage, bundles, bags, and packages of passengers and crew members who arrive at piers and airports of Puerto Rico from the United States.

Both the Fourth Amendment of the U. S. Constitution and Article II, Section 10, of the Constitution of the Commonwealth of Puerto Rico provide that the right of the people to be secure in their persons, houses, papers, documents, belongings and effects against unreasonable searches and seizures shall not be violated. Warrants for arrest, search or seizure shall only be issued under judicial authority, and only when there is probably cause, supported by oath or affirmation, describing in detail the place to be searched and the persons to be arrested or the things to be seized--so far with the similarity between both constitutional provisions. Our Constitution has an additional provision, not contained in the Constitution of the United States but which has been adopted in U. S. case law. It reads as follows: "Evidence obtained in violation of this section shall be inadmissible in the courts." Although these constitutional

provisions bar searches or seizures without a judicial order, both the U. S. and our Supreme Court have recognized some exceptions to the general principle.

Among the exceptions recognized, to mention a few, are the search incidental to a legal arrest, the search wherein the property to be seized is in the process or in imminent danger of destruction and the search prior to arrest when the circumstances make it imperative, such as when the life of the agents or of other persons would be endangered if the search is not carried out.

One of the exceptions to the constitutional protection of the Fourth Amendment allowed by the courts in the federal jurisdiction is the so-called border search; also the search carried out in airports and piers, since the purpose of both is to uncover smuggling, rather than to detect and investigate crimes already committed.

Federal Customs and Immigration officials who inspect luggage and persons at the borders of the United States are authorized to carry out their work under the mere suspicion that there is or illegal merchandise. Likewise, the search of vessels and vehicles for contraband is justified. Said inspection without a warrant and without the need for reasonable grounds is allowed both for aliens as well as for American citizens coming from abroad.

In Henderson v. United States, 390 F.2d 805 it was held that: "Border searches are unique and the mere fact that a person is crossing the border is sufficient cause for a search. Thus every person crossing our border may be requried to disclose the contents of his baggage, and of his vehicle, if he has one; even mere suspicion is not required."

In John Bacall Imports, Limited v. United States, 287 F. Supp. 916 it was held, regarding this matter of border searches: "Border searches are outside the protection of this amendment and a search which would be unreasonable if conducted by the police in an ordinary case, may be reasonable when conducted by customs officials in lawful pursuit of unlawful imports, but only when incident to a border search."

Finally, with regard to border searches we shall point out the case of United States v. Stornini, 443 F.2d 833, (Ct. App. 1st Cir.), where it was held that: "Customs officials may serach an individual's baggage and outer clothing in a reasonable manner, based on subjective suspicion alone, or even on a random basis.", and that of Cervantes v. United States, 263 F.2d 800 (9th Cir.) where it was stated: "For the normal border serach of such things as cars, suitcases, and handbags, no showing of probable cause, or even supported suspicion, is necessary." See also: Almeida Sánchez v. United States, 413 U.S. 266 (1973) and Carroll v. United States, 267 U.S. 131 (1925).

It is a well-known fact that Puerto Rico faces a serious problem with the traffic and smuggling of narcotics, firearms and explosives on the part of individuals who travel freely between Puerto Rico and the United States. Said problem has worsened during the last few years notwithstanding the measures taken by local as well as federal authorities to cope with the same. This is particularly due to the fact that Puerto Rico does not have, at its airports and piers, an office for the inspection of luggage, packages, bundles and bags of passengers and crew members who travel between Puerto Rico and the United States. The need arose for the government of the Commonwealth of Puerto Rico to set up some sort of effective and corrective measure to eliminate this increasing illegal traffic which was progressively becoming more profitable, in view of the fact that there was no control on the part of the United States government. As far as we know, the federal government exerts no effective control in this area; it only carries out sporadic inspections through the U. S. Department of Agriculture when checking for tropical fruits and plants which may be harmful to public health and agriculture.

We don't have the slightest doubt that it was imperative that the local government take necessary and effective steps to cope with this problem. We have no doubts either as to the fact that said area is not covered by federal agencies whose function it is to protect the territorial borders of the

United States against the illegal entry of persons and smuggled goods from abroad. This is not a case of the federal government preempting the field or covering the area of the state or local government, which could give rise to problems of jurisdiction or conflict of authority between both governments.

Areas not regulated by the federal government or expressly barred to local governments by the Constitution of the United States may be regulated by the latter through legislation, in the unquestionable exercise of their police power.

Our geographic location, the fact that we are an island and do not share common borders with other nations, has not constituted an effective natural barrier to the free and continuous flow and movement of people between Puerto Rico and the United States and between Puerto Rico and other faraway parts of the world. This is due to modern transportation means and to the availability of the same brought about by recent technological advances in a world in constant change, such as ours. Said increase in the flow of passengers between Puerto Rico and the United States and other parts of the world, and the failure to inspect the luggage of passengers and crew members on domestic flights, have served as fertile ground for ambitious and unscrupulous people who try to profit from said circumstances.

This court takes judicial notice of the fact that, in proportion to size, the

Isla Verde International Airport is one of the busiest airports in terms of passenger and cargo traffic in the whole world.

In our opinion, this is the correct perspective for viewing and resolving questions raised before us. Faced with this problem, the local government had the obligation of taking the most vigorous and effective action it could to correct said situation. We cannot think of any other action that could be more direct and more effective in the solution of this great problem the country faced and still faces than to legislate authorizing police authorities to inspect the luggage, packages, bundles and bags of passengers and crew members who disembark in Puerto Rican airports and piers on arrival from the United States. It is our opinion that the present circumstances and the magnitude of the problem made imperative the passage of the legislation enacted and whose constitutionality is now challenged before this Court. There are legitimate public interests to justify said legislation. We could not and should not forget that the social harm caused by this is not only limited to the legal violations, such as the introduction into the country of drugs, explosives and firearms in a clandestine fashion, but we should have in mind that these are the instruments used in the commission of more serious crimes, such as robbery, murder, damages to public and private property through the use of explosives, and even sometimes death of innocent people, and especially the

terrible crime of narcotic drugs, through which a trafficker profits from human misery and from the grief and sorrow of other people. These factors, among others, carry a lot of weight on the attitude of this Court and have been seriously considered and weighed with the defendant's right to the protection of the Fourth Ammendment of the U.S. Constitution and the protection provided by our own Constitution.

Since compelling public interests are involved in this problem, it was imperative to draft legislation, such as the one treated here, that would allow the State to deal directly and effectively with the continuous violations of law represented by this illegal traffic of firearms, explosives and narcotics between the United States and Puerto Rico.

When asked to construe the constitutionality of this Act, it is imperative that we apply, by analogy, the exception to the constitutional protection established through case law with regard to border searches because of the peculiar condition of our island, the unrestricted ease with which American citizens travel from any point in the United States to Puerto Rico, and vice versa, the frequency with which domestic flights arrive at and depart from our airport, and also because the inspection carried out under this Act is not covered by the Federal government.

In arriving at this conclusion, we have not forgotten the constitutional

guarantees pointed out to us which have made the American nation and its judicial system great and which, like ours, has distinguished itself as an avant-garde one which continually protects the rights of citizens. But, Puerto Rico's present circumstances require that courts re-examine the legal doctrines in effect, adapt Law to our times, and adopt the rules that best serve the interests of society as a whole, particularly when public safety and perhaps even its own existence are at stake.

There are times when the right of the citizen should yield to the right of the whole community to be able to walk its streets freely without fear of being mugged, mutilated, or perhaps murdered and not fearful that one of its children may be pushed into drug addiction. Because of the weight and importance of public interest in this case, the State is forced to take these measures of self-protection, even at the price of individual rights which were once absolutely inviolable and sacred. The harm or inconvenience that may be caused to a citizen, whether a passenger or crew member, is minimal if we compare it with the benefits sought with said legislation.

This court understands that this Act is not unreasonable or burdensome and that, as it has been applied up to the present, it does not interfere with interstate commerce; on the contrary, it complements the federal government's investigative function exercised at "our borders" or territorial limits.

In the case of Edwards vs. Cal., 314 U.S. 160 (1941) at page 172, the Supreme Court of the United States recognizes that: "States are not wholly precluded from exercising their police power in matters of local concern even though they may thereby affect interstate commerce."

On this point, also see: California vs. Thompson, 313 U.S. 109 (1941).

On this basis of these conclusions, this court hereby dismises the objection raised by defendant to the admissibility of evidence and consequently orders that the same be admitted and marked with the corresponding exhibit number in the order they were offered.

To be notified.

Given in Open Court this 22nd day of December, 1976 and transcribed this 29th day of December, 1976.

CHARLES E. FIGUEROA ALVAREZ
Superior Court Judge

ATTEST:

BELEN BONIT
CLERK

DORIS MORALES
SUPERVISOR CRIMINAL DIVISION

NOTIFIED:

Hon. Federico L. Torres
Box 192
San Juan

Lcdo. Luis Lamberty González
Cond. El Centro II-Suite 607
500 Muñoz Rivera Avenue
Hato Rey 00918

I HEREBY CERTIFY that on this ____ day of January 1977 I sent a copy of this resolution and order to the persons mentioned above to their respective addresses.

Deputy Clerk

APPENDIX D

IN THE SUPREME COURT OF PUERTO RICO

THE PEOPLE OF PUERTO RICO Plaintiff-appellee v. No. Cr-77-24 TERRY TERROL TORRES LOZADA Defendant-appellant	Judgment of the Superior Court, San Juan Part, Charles E. Figueroa, Judge Article 404, Controlled Substances Act

= A P P E A L =

TO THE HONORABLE COURT:

Comes now defendant, represented by the undersigned attorneys, and very respectfully states that, feeling aggrieved with the judgment rendered by this Hon. Court on December 14, 1977, affirming the judgment rendered by the Superior Court, San Juan Part, on January 7, 1977, he shall appeal the same before the Honorable Supreme Court of the United States.

Defendant-appellant prays this Honorable Court to direct the Chief Clerk to translate the record of this case into the English language; to

certify said transaction upon payment of the required fees and to send it to the Honorable Supreme Court of the United States.

San Juan, Puerto Rico, this 21st day of December 1977.

Celedonio Medín Lozada
Celedonio Medín Lozada Gentile
Attorneys for Defendant-Appellant

By: (Sgd.) Celedonio Medín Lozada

I CERTIFY: That on this same date I have served a copy of the foregoing appeal upon Att. Héctor A. Colón Cruz, Solicitor General, Department of Justice, Box 192, San Juan, Puerto Rico.

(Sgd.) Celedonio Medín Lozada

APPENDIX E

IN THE SUPREME COURT OF PUERTO RICO

THE PEOPLE OF PUERTO RICO Plaintiff and appellee v. No. Cr-77-24 TERRY TEROL TORRES LOZADA Defendant and appellant	Judgment of the Superior Court, San Juan Part, Charles E. Figueroa, Judge Article 404, Controlled Substances Act

= AMENDED NOTICE OF APPEAL =

TO THE HONORABLE SUPREME COURT

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, appellant Terry Terol Torres Lozada hereby amends his notice of appeal in order to add the following:

1. The party appealing is Terry Terol Torres Lozada, Appellant;

2. Appellant appeals the judgment affirming his conviction.

3. The appellate jurisdiction of the United States Supreme Court is based on the provisions of 28 U.S.C.A. § 1258.

4. The appeal is based on the fact that he was convicted on evidence obtained in violation of his rights under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. In addition, appellant maintains that the application of Article 5, Section 4, of the Constitution of the Commonwealth of Puerto Rico to this case deprives him of his rights under the Fourth Fifth, and Fourteenth Amendments of the United States Constitution, since his conviction was affirmed notwithstanding that the majority of the justices who took part in the case are of the opinion that the evidence on which appellant's conviction was based was obtained in violation of the United States Constitution.

In Mayaguez for San Juan, Puerto Rico, this 11th day of January 1978.

I, Celedonio Medin Lozada, of age, married, lawyer, and resident of Mayaguez, Puerto Rico, do hereby state under oath that on this same date I have served by mail a copy of the foregoing notice upon the Honorable Solicitor General, Department

of Justice, Box 192, San Juan, Puerto Rico.

(Sgd.) Celedonio Medín Lozada
CELEDONIO MEDIN LOZADA
One of the Attorneys
for Appellant

AFF. NO. 2658

Sworn to and subscribed before me by Don Celedonio Medín Lozada, of the aforesaid personal circumstances, personally known to me, at Mayaguez, Puerto Rico, on this 11th day of January, 1978.

(Sgd.)
Miguel Hernández Colón
NOTARY PUBLIC

(Notarial Seal)

APPENDIX F

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE II, SECTION 10, OF THE CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO (48 U.S.C. § 731d):

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Wire-tapping is prohibited.

No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.

Evidence obtained in violation of this section shall be inadmissible in the courts.

ARTICLE V, SECTION 4, OF THE CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO (AS QUOTED BY THE PUERTO RICAN SUPREME COURT, APPENDIX B):

The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

The version quoted by the Puerto Rican Supreme Court differed slightly from that in 48 U.S.C. § 731d; which read as follows:

The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions. All the decisions of the Supreme Court shall be concurred in by a majority of its members. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

PUBLIC LAW 22: 7th SPECIAL SESSION - 7th ASSEMBLY, COMMONWEALTH OF PUERTO RICO

Police - Inspection of Luggage, etc., of Passengers and Crew

[No. 22]
[Approved August 6, 1975]

AN ACT

To empower and authorize the Police of Puerto Rico to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question and search those persons whom the Police have ground to suspect that are illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

STATEMENT OF MOTIVES

Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.

It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law. The Federal Government does not require these passengers or crew to go through the Customhouse after arrival in the Island for inspection of their luggage or person. This has contributed greatly to an increase in the smuggling of firearms, explosives, and narcotic drugs by this means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship.

The inspection of luggage, cargo and persons to reduce the introduction of firearms, explosives, and narcotic drugs illegally brought from the United States to Puerto Rico is a legitimate area of control on the part of our government in exercising its police power, especially when the same is not covered by the Federal Government, and there is no conflict of authority on this matter between both governments.

Be it enacted by the Legislature of Puerto Rico:

Section 1. -

The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

Section 2. -

Advertisement of the provisions of this act shall be placed in a visible place on piers and airports by the Police of Puerto Rico for all landing passengers.

Section 3. -

Personnel assigned to implement this act shall wear a uniform as determined by the Police Superintendent, and shall be provided with credentials to be shown to the persons concerned before searching them. The search shall be in a respectful way, and as brief as possible.

Manual search of persons shall be carried out by individuals of the same sex as the person involved, and in appropriate places guaranteeing the greatest privacy.

Section 4. -

The Police Superintendent may request the cooperation and collaboration of any Commonwealth or Federal Agency or department whenever necessary and pertinent for the purposes of this act.

Section 5. -

Funds for the enforcement of this measure shall be appropriated in the General Budget of the Police of Puerto Rico.

- Laws of Puerto Rico, 1975, West, pp. 658-659

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

JURISDICTIONAL STATEMENT FILED MAY 12, 1978
PROBABLE JURISDICTION NOTED OCTOBER 2, 1978

All of the relevant portions of the record have already been reproduced in appendices to either the Jurisdictional Statement or the Motion to Dismiss or Affirm. This Joint Appendix contains an Index to where those documents may be found as well as the docket entries in the Supreme Court of Puerto Rico. The Superior Court does not maintain docket entries in criminal cases.

Index to Relevant Portions of the Record Printed Elsewhere

Docket Entries in the Supreme Court of Puerto Rico

(CRIMINAL DOCKET)

REGISTRO DE APELACIONES CRIMINALES

EL PUEBLO DE PUERTO RICO
(THE PEOPLE OF PUERTO RICO)

v.

Apelante (Appellant) TERRY TERROL TORRES LOZADA

PROCEDENCIA
(APPEAL FROM)

Sala SAN JUAN PART — Caso Num. G-76-3105 (Case No.)

Delito (Offense) ART. 404 OF THE CONTROLLED SUBSTANCES ACT — Juez (Judge) CHARLES E. FIGUEROA ALVAREZ

Sentencia dictada el (Judgment rendered on) JANUARY de 7, de 1977

ABOGADOS
(ATTORNEYS)

De la parte apelante (For Appellant) LUIS LAMBERTY, CELEDONIO MEDIN LOZADA, CELEDONIO MEDIN LOZADA GENTILE

De la parte apelada (For Appellee) HON. SOLICITOR GENERAL

Disposicion (Decision) de de 19

Otros detalles (Other details)

Caso Núm. C-R-77-24 (Case No.)

DOCUMENTOS PRESENTADOS Y RESOLUCIONES RECAIDAS

(DOCUMENTS FILED AND RESOLUTIONS ENTERED)

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FECHA (DATE) MES DIA ANO (Month Day Year)	
9 - 21 - 77	(Defendant-appellant asks) permission to file Supplemental Brief
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12 - 14 - 77	(Judgment is) affirmed
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1 - 4 - 78	Mandate is retained and appellant is granted 10 (ten) days to specify documents to be translated
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COMMONWEALTH OF PUERTO RICO
SUPREME COURT
Office of the Secretary
San Juan, Puerto Rico

CHIEF CLERK'S CERTIFICATE

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is an official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the docket entries in the case of *The People of Puerto Rico* v. *Terry Terrol Torres Lozada,* No. Cr-77-24, the original of which in Spanish is under my custody in this office.

IN WITNESS WHEREOF, I issue these presents, under my hand and the seal of this Court in San Juan, Puerto Rico, this 10th day of October 1978.

/s/ ERNESTO L. CHIESA
Ernesto L. Chiesa
Chief Clerk
Supreme Court of Puerto Rico

[SEAL]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES, *Appellant,*

v.

COMMONWEALTH OF PUERTO RICO, *Appellee*

On Appeal from the Supreme Court of the Commonwealth of Puerto Rico

---

MOTION TO DISMISS OR AFFIRM

HECTOR A. COLON CRUZ
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IN THE

Supreme Court of the United States

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TERRY T. TORRES, *Appellant,*

v.

COMMONWEALTH OF PUERTO RICO, *Appellee*

On Appeal from the Supreme Court of the Commonwealth of Puerto Rico

---

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the Commonwealth of Puerto Rico on the grounds that the appeal as a whole does not present a substantial federal question and at least one of the federal questions sought to be reviewed was not timely raised or properly raised nor expressly passed on.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on by the Supreme Court of the Commonwealth of Puerto Rico upholding the judgment rendered by the Superior Court, San Juan Section on the 22nd day of December, 1976, convicting appellant for violating article 404 of the Controlled Substances Act. (Title 24 L.P.R.A. 2404).

It raises, among others, the question of the validity of Commonwealth of Puerto Rico Public Law No. 22, of August 6, 1975, Title 25 L.P.R.A., secs. 1051-1054:

> "To empower and authorize the Police of Puerto Rico to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question and search those persons whom the Police have ground to suspect that are illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances."

and of Article V, Sec. 4 of the Constitution of the Commonwealth of Puerto Rico, as applied to appellant, which provides:

> "The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law."

Facts stated on appellant's Jurisdictional Statement are basically correct and in order to avoid repetition we adopt them herein, merely adding the fact that when appellant's luggage was searched by the officers a paper bag containing marihuana, a pipe with marihuana residues and $250,000 in cash were found.

SUMMARY OF ARGUMENT

Pursuant to Rule 40 of the Rules of this Court, appellee succinctly states a summary of the argument herein contained. Appellee's motion to dismiss or affirm will be based, firstly, on the fact that at least one of the federal questions sought to be reviewed was not timely raised or expressedly passed on, particularly the question dealing with Article V, Sec. 4 of the Constitution of Puerto Rico. It will be our contention that appellant did not use the procedural mechanism provided by Rule 45 of the Rules of the Supreme Court of Puerto Rico, thus refusing to give the Puerto Rican Supreme Court a chance to interpret its own constitution, limiting himself to raising the issue for the first time before this Court.

Secondly, appellee's motion will also be based on the fact that the appeal as a whole does not present a substantial federal question. In relation to the fact that Article V, Section 4 of the Constitution of the Commonwealth of Puerto Rico violates the due process clause, appellee will discuss similar patterns found in various state constitutions and how they have been constitutionally upheld.

As far as the other questions are concerned, appellee will discuss what we have called a functional approach to frontiers, viewing Puerto Rico as an intermediate boundary such as the Virgin Island's one. A discussion of why searches without probable

cause ought to be allowed in intermediate borders will follow, considering factors such as the police power of the states.

ARGUMENT

We have considered it more convenient to alter the order of the issues presented by the appellant in view of the fact that an attack upon the jurisdiction of this Court will be part of our argument. After the discussion of the jurisdictional matter, the substantiality of the questions presented will be discussed.

ONE OF THE QUESTIONS SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED NOR WAS EXPRESSLY PASSED UPON

In his Jurisdictional Statement, appellant raised the question as to whether the provision of the Puerto Rican Constitution which requires a majority vote of the total number of Justices of which the Supreme Court is composed, before a statute can be declared invalid, unconstitutionally violates appellant's right to due process.

Article V, Section 4 of the Constitution of Puerto Rico provides that:

> ". . . no law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law."

Public Law Number 11, of July 24, 1952, Title 4 L.P.R.A. section 31, which implements this constitutional provisions, reads as follows:

> "The Supreme Court shall be the court of last resort in Puerto Rico, and shall be composed of a Chief Justice and six Associate Justices. The number of justices may be changed only by law upon request of the Supreme Court. While there is no vacancy in addition to the existing one, the Court shall continue sitting as at present constituted.
>
> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court, or in divisions composed of not less than three (3) justices. No law shall be held unconstitutional unless by a majority of the total number of justices composing the Court in accordance with the Constitution of the Commonwealth or with law."[1]

The facts already stated show that on December 14, 1977 a judgment was rendered by the Puerto Rican Supreme Court whereby although a majority of the Justices who heard the case (seven (7) Justices, since one of the members of the Court did not participate), believed Public Law 22, supra, to be unconstitutional, said judgment was nevertheless affirmed pursuant to the aforementioned Article V, Section 4 of the Constitution of the Commonwealth of Puerto Rico. (Appellants Appendix B pp. 99-100)

It is also accepted by the appellant that it was not until April 14, 1978, while the case was already before this Honorable Court, that an untimely motion for reconsideration was filed in the Puerto Rican Supreme Court. (Appellant's Jurisdictional Statement, pp. 20) It was in this untimely filed motion that appellant, for the first time, raised the question of the possible unconstitutionality of Article V, Section 4 of the Consti-

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[1] It should be noted that appellant agrees that the Supreme Court was composed of a total number of eight members at the time the constitutional questions were raised (Appellants Jurisdictional Statement, page 25).

tution of Commonwealth of Puerto Rico as applied in his case (Appellee's Appendix A p. 1a).

Appellant incorrectly argues that this issue appeared for the first time after the judgment of the Puerto Rican Supreme Court and thus it could not have been raised before. Appellee earnestly differs from appellant's argument and is of the opinion that the issue was not properly raised nor expressly passed upon. The only new fact included in the Motion for Reconsideration was a reference to a newspaper report which alleged that Mr. Justice Rigau, who did not participate in the Court's decision, was willing to pass judgment [1] and vote on the constitutionality of Public Law 22, supra.

Rule 45 of the Rules of the Puerto Rico's Supreme Court (Title 4 L.P.R.A. App. I-A) reads as follows:

> "(a) Ten working days after copy of the decision of the Court rendered in a case has been sent to the parties, the Clerk shall send the mandate to the trial court, unless a motion for reconsideration has been filed within said term, or the Court has ordered the retention of the mandate.
>
> (b) Any motion for reconsideration must be filed within the aforementioned term of 10 working days. No separate memorandum of authorities or a petition for extension to ground a reconsideration filed, shall be accepted; the authorities must be discussed in the body of the motion. The Clerk shall deny outright any petition for extension to file a motion for reconsideration, or papers in support thereof.

[1] It should be noted that the Rules of the Supreme Court of Puerto Rico in its Rule 3 (4 L.P.R.A. App I-A) prohibits the Chief Justice to exclude any Justice of the Court of performing his functions against his will.

> (c) Once the motion for reconsideration has been decided, the mandate shall be sent three working days after the copy of the order regarding the reconsideration has been sent to the parties, and any subsequent motion for reconsideration shall be filed within said term.
>
> (d) Any motion for reconsideration filed out of the aforementioned terms shall be considered by the Court only in the degree in which what is requested therein can be totally or partially granted without adversely effecting the execution of the mandate.
>
> (e) In any case in which a judgment or order of this Court may be reviewed by the Supreme Court of the United States by way of certiorari, the mandate to the trial court may be retained, at the request of a party, for a reasonable period of time. If within such term there shall be filed with the Office of the Clerk a certificate from the Clerk of the Supreme Court of the United States establishing the fact that the petition for certiorari, the record, and the brief have been filed before that Court, the mandate shall be retained until final disposition of the petition for certiorari. Upon presentation of a copy of the order of the Supreme Court of the United States denying the issuance of the writ, the mandate shall forthwith be sent to the trial court. In the motion for retention of the mandate, the moving party shall recite the questions to be raised in the petition for certiorari, making reference to the pertinent facts and circumstances of the case."

Once appellant received the Supreme Court of Puerto Rico's decision of December 14, 1977, he was duly apprised that only seven of the eight justices who form said Court had participated in the adjudication of his case, he was also aware of the fact that a majority of them, four, were of the opinion that Public

Law No. 22, supra, was unconstitutional. Notwithstanding the fact that he was then on notice of the aforementioned, he did not avail himself of the procedural mechanism provided by the above cited Rule 45 to timely file his motion for reconsideration and raise the constitutional issue, thus giving the Puerto Rican Supreme Court a chance to interpret its own constitution. Appellant has just limited himself to raising the issue for the first time before this Court. Appellant's possible argument that a motion for reconsideration was filed is of no avail since this was not done within the time limit provided by the already cited Rule 45, namely 10 working days. Therefore, we understand as did the Supreme Court of Puerto Rico in its Resolution of May 4, 1978 (Appellee Appendix B, p. 6a), that appellant's motion for reconsideration was untimely.

It has been a long established rule of this Court that the attempt to raise a federal question after judgment by the highest State Court, upon a petition for rehearing, comes too late, unless the court actually entertains and decides the question. *McCorguoadale* v. *State of Texas,* 211 U.S. 432 (1908); *Forber* v. *State Council of Virginia,* 216 U.S. 396 (1910); *Consolidated Turnpike* v. *Norfolk & Ocean View Ry. Co.,* 228 U.S. 326 (1913); *Godchaux Co.* v. *Estopinal,* 251 U.S. 179 (1919); *American Surety Co.* v. *Baldwin,* 287 U.S. 156 (1932); *Herndon* v. *Georgia,* 295 U.S. 441 (1935); *Radio Station WOW* v. *Johnson,* 326 U.S. 120 (1945); *Hanson* v. *Denckla,* 357 U.S. 235 (1958).

Furthermore and along this same line of thought this Court has held that when a constitutional question is not timely raised in state court proceedings that question is not open in proceedings on petition for certiorari. *Ellis* v. *Dixon,* 349 U.S. 458, 99 L. Ed. 1231 (1955), *rehearing denied* 350 U.S. 855, 100 L. Ed. 759.

Flournoy v. *Wiener,* 321 U.S. 253, 88 L. Ed. 708 (1944). See also *Corretjer* v. *People of Puerto Rico,* 194 F. 2d 527 (1952); *Prensa Insular de Puerto Rico* v. *People of Puerto Rico,* 189 F. 2d 1019 (1951).

In *Radio Station WOW* v. *Johnson,* supra, this Court held:

> ". . . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U.S.C. § 344 (a). This requirement is not one of those technicalities to be earily scorned. It is an important factor in the smooth working of our federal system." (at pp. 124)

* * *

"Questions first presented to the highest state court on a petition for rehearing come too late for consideration here, unless the state court exerted its jurisdiction in such way that the case could have been brought here had the questions been raised prior to the original disposition." (at pp. 128)

Again in *North Dakota Pharmacy B.D.* v. *Snyder's Drug Stores,* 414 U.S. 156 (1973) this Court stated:

> "The finality requirement of 28 U.S.C. § 1257, which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

See also *Tacon* v. *Arizona,* 410 U.S. 351 (1973), *Jenkins* v. *Georgia,* 418 U.S. 153 (1974); *Banks* v. *California,* 395 U.S. 708 (1969); *Lamb Enterprises Inc.* v. *Kiroff,* 399 F. Supp. 409 (1975); *J.&S. Construction* v. *Travelers,* 520 F. 2d 809 (1975).

This judicial norm is of even more appropriate application when dealing with a case originating in the Supreme Court of Puerto Rico since it has been a long standing rule of this Court that:

> ". . . 'For a due regard for the status of that Commonwealth under its compact with the Congress of the United States dictates, we believe, that it should have the primary opportunity through its courts to determine the intended scope of its own legislation and to pass upon the validity of that legislation under its own constitution as well as under the Constitution of the United States.' 266 F. Supp. 401, 405 (1966)". See *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974).

In view of the above to remand the case for consideration of the motion for reconsideration would be equivalent to amending Puerto Rico's Supreme Court

Rule 45 and granting the appellant a right which he deliberately surrendered by his own lack of due diligence.

Now even if the question concerning the constitutionality of Article V, Sec. 4 of the Commonwealth of Puerto Rico, supra, as applied to appellant's case were properly before this Court, we are of the opinion that it does not present a substantial federal question.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. "Whether Art. V. Sec. 4 of the Constitution of the Commonwealth of Puerto Rico Operate to Deny Appellant His Right to Due Process of Law by Precluding the Supreme Court of Puerto Rico From Reversing Appellant's Conviction for Possession of Marihuana Even Though A Majority of the Justices Who Heard the Case Were Convinced That the Conviction Was Obtained In Violation To the Fourth Amendment of United States Constitution?" (Appellant's Jurisdictional Statement p. 5)

Article V. section 4 of the Constitution of Puerto Rico provides that:

> ". . . no law shall be held unconstitutional except by a majority of the total number of justices of which the Court is composed in accordance with this Constitution or with the law."

The motives for this specific wording are found in the following portion of the legislative debates:

> ". . . What we have wished to establish here is to constitutionally acknowledge the validity of the principle that every statute is presumed constitutional, and establish that, in order to declare it anticonstitutional, it is not enough to have a majority of the number acting at a given moment in the court, but rather the absolute majority

of all members comprising the court as formed . . . and it is precisely responding to the principle that there must prevail the will legislatively expressed by the people at a given moment, and that the principle presuming every statute constitutional must be sustained. . . . What the last provision wishes to avoid is that in a court of five members where, for any reason, only three are acting, two of these may decide for constitutional. . . ." (Appellee's translation) I Diario de Sesionses de la Convención Constituyente 568, 569, 3 de diciembre de 1951.

On the other hand, Puerto Rico's Constitution is not unique in this respect, similar patterns are found in various state constitutions and have been constitutionally upheld. See *Ohio ex rel Bryant* v. *Akron Metropolitan Park District,* 281 U.S. 74 (1930), *City of Bismarck* v. *Materi,* 177 N.W. 2d 530, 537 (1970), *Funkhouser* v. *Spahr,* 102 Va. 306, 46 S.E. 378 (1904). States such as North Dakota,[3] Arizona,[4] Virginia [5] and Colorado [6] have very similar provisions.

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[3] The Constitution of North Dakota in its Art. IV, Secs. 86 and 88 reads as follows:

". . . The Supreme Court shall consist of 5 justices, one of whom shall be designated chief justice in the manner provided by law."

Sec. 88:

"A majority of the Supreme Court shall be necessary to constitute a quorum or to pronounce a decision, provided that the Supreme Court shall not declare a legislature enactment unconstitutional unless at least four of the members of the court so decide."

See: 13 North Dakota Century Code Annotated 30, 33; *City of Bismarck* v. *Materi,* 177 N.W. 2d 530, 537 (1970). *Wilson* v. *Fargo,* 186 N.W. 263 (1921), *State ex rel Mason* v. *Baker,* 288 N.W. 206 (1936).

(Footnotes 4, 5 and 6 on facing page)

It is the constitutional prerogative of the Supreme Court of Puerto Rico to determine the internal regulations of its working. See art. V sec. 4 of the Constitution of the Commonwealth, supra.

In the Rules adopted by the Supreme Court of Puerto Rico under its regulatory powers we find Rule 3 and Rule 6 of the Rules of the Supreme Court (Title 4 L.P.R.A. App. I A) which govern this matter case reads as follows:

Rule 3 reads as follows:

(4) *Sitting in full*

The Court sitting in full shall take cognizance of the decision of all civil and criminal matters, and shall intervene in complaints against judges

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[4] The Constitution of Arizona, Art. 6, Sec. 2:

"The Supreme Court shall consist of not less than five justices . . .

The Supreme Court shall sit in accordance with rules adopted by it either in banc or in divisions or not less than three justices, but the court shall not declare any law unconstitutional except when sitting in banc . . ."

See: 1 Arizona Revised Statutes Annotated 72.

[5] The Constitution of Virginia, Art. VI, sec. 2:

"The Supreme Court shall consist of 7 justices . . . no decision shall become the judgment of the Court, however, except on the concurrence of at least 3 justices, and no law shall be declared unconstitutional under either this Constitution or the Constitution of United States except on the concurrence of at least a majority of all the justices of the Supreme Court."

(See 1 Code of Virginia, 80; *Funkhouser* v. *Spahr,* 102 Va. 306, 46 S.E. 378 (1904)).

[6] The Constitution of Colorado, Art. VI, Sec. 5 states:

"No less than 7 justices who may sit in banc or in departments . . . No case involving construction of the constitution of this State or of the United States shall be decided except by the court in banc." (See 5 Colorado Revised Statutes Annotated 141, (1935 Ed.)

and in disciplinary proceedings against the rehabilitation of attorneys.

The decisions of the Court in full shall be adopted by a majority of the justices who participate, but no law shall be held unconstitutional except by a majority of the total number of justices of which the Court is composed. . . .

(b) *Organization of the divisions*

The Chief Justice shall designate the justices who shall compose the Divisions, but no justice shall be excluded from that function against his will. Whenever it might be necessary in order to prevent such exclusion, the members of the Division or Divisions shall be rotated.

All the justices composing a Division shall take part in the consideration and decision of all the matters submitted to the same. The votes of at least half of the justices who participate shall be required for the issuance of a writ. The orders of a Division shall be identified as originating in the Division delivering them, setting forth the justices who compose it. . . .—May 23, 1975 eff. September 1, 1975, amended May 27, 1976 eff. June 1, 1976.

Rule 6 reads:

"Five justices shall constitute a quorum when the Court is sitting in banc. The quorum for a Division shall be the total number of the Justices who compose it."—May 23, 1975. eff. Sept. 1, 1975.

Can it be said that cases decided by a Court with only a quorum sitting are violative of due process?

By constitutional mandate the Florida Supreme Court[1] consists of seven justices of which 5 shall constitute quorum and the concurrence of four shall be necessary to a decision. Recently in the case of *Campbell* v. *Supreme Court of Florida,* 428 F. 2d 449 (1970) the Court upheld the statute in question, on an appeal from a death penalty held before five justices rather than seven justices and where a decision concurred by three rather than four justices was rendered, on the grounds that the above procedure did not deprive the accused of his right to due process. Notice the similarity of this provision with the Puerto Rico's Supreme Court Rule 6 cited above.

It is thus our contention that appellant has not shown how his right to due process was abridged and therefore that no substantial federal question has been raised.

B. "Whether Puerto Rico May Constitutionally Enact A Law That Authorizes the Indiscriminate Warrantless Search and Seizure, Without Probable Cause, of Persons and Property Arriving In Puerto Rico From Other Parts of the United States."

"Whether Puerto Rico Constitutionally May Create A 'De Facto' International Border Between Itself and Other Parts of the United States?"

"Whether Public Law No. 22, 25 L.P.R.A. § 1051-1054, Unlawfully Abridges the Right to Travel By Subjecting Individuals to Indiscriminate, Warrantless Searches Without Probable Cause Upon Their Entry Into the Commonwealth of Puerto Rico From Other Parts of the United States?"

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[1] The Florida Constitution in its art. V, sec. 3 reads:

"The Supreme Court shall consist of 7 justices . . . five shall constitute a quorum. The concurrence of four shall be necessary to a decision . . ."

(See 25 Florida Statutes Annotated 127)

I. Functional Approach to Frontiers:

It has been said that there are just two categories of intercommunity borders: international frontiers[8] or interstate borders. However there already exist, with legal recognition, other types of borders that do not fit either of these two categories. This case deals with precisely one such type of intermediate boundary.

In *Almeida Sánchez* v. *U.S.*, 413 U.S. 266 (1973), this Honorable Court went beyond a strictly geographical understanding of what and where a frontier is. In that case, we might recall, the United States Supreme Court established a new working scheme labeled "functionally equivalent" borders. A station near the physical territorial edge of the country was held to be a border for Fourth Amendment purposes. Likewise, an airport in a midwestern city very distant from the actual geographical frontier was also functionally equivalent to the border post. Thus the traditional conceptual or exclusively landmark based border has already been superseded.

This is not to deny that legal notions of frontiers are related to geographical boundaries which themselves sometimes coincide with political boundaries. There can be economic cultural, tax, population and ethnic frontiers which are not given constitutional recognition, although their distinctiveness cannot be denied. The notion of a frontier is not a magic litmus paper that either grants total immunity or total subjection of the citizen to the intrusive interests of the

[8] Section 287 (a) of the Immigration Nationality Act (8 U.S.C.A., Section 1357 (a), 19 U.S.C. Section 482, 1461, 1467, 1496, 1581, 1582) See also *U.S.* v. *Ramsey*, 45 L.W. 4577 (1977).

state no matter how lofty they be. There are gradations of bundles of rights that depend on the type of intercommunity border under scrutiny.

In this case we are dealing with a boundary that is politically, geographically, economically, culturally and taxwise recognizable as distinct from the continental union of states and its interstate borders: although it clearly does not reach the category of an international border.[9]

Admittedly there are few such intermediate boundaries but this does not mean that the notion is spurious just because it has limited application.

Our neighboring Virgin Islands can be cited as one of such intermediate boundaries given recognition in law. On incoming flights or vessels from the Virgin Islands all passengers of American or foreign citizenship are subject to searches under section 581 Tariff Act of 1930 as amended 19 U.S.C. Sec. 1581. Also see 19 U.S.C. § 1467.[10]

[9] See the cases of *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970); *Calero Toledo* v. *Pearson Yatch Leasing Co.*, supra; *Examining Board of Engineers* v. *Flores Otero*, 426 U.S. 572 (1976).

[10] 19 U.S.C. sec. 1581:

"(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package or cargo on board, and to this end may hail and stop such vessel or vehicle and use all necessary force to compel compliance.

(Footnote 10 continues on following page)

(b) Officers of the Department of the Treasury and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

(c) Any master of a vessel being examined as herein provided, who presents any forged, altered or false document or paper to the examining officer, knowing the same to be forged, altered, or false and without revealing the fact shall, in addition to any forfeiture to which in consequence the vessel may be subject, be liable to a fine of not more than $5,000 nor less than $500.

(d) Any vessel or vehicle which, at any authorized place, is directed to come to a stop by any officer of the customs, or is directed to come to a stop by signal made by any vessel employed in the service of the customs and displaying proper insignia, shall come to a stop, and upon failure to comply a vessel or vehicle so directed to come to a stop shall become subject to pursuit and the master, owner, operator, or person in charge thereof shall be liable to a penalty of not more than $5,000 nor less than $1,000.

(e) If upon the examination of any vessel or vehicle it shall appear that a breach of the laws of the United States is being or has been committed so as to render such vessel or vehicle or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the same shall be seized and any person who has engaged in such breach shall be arrested.

(f) It shall be the duty of the several officers of the customs to seize and secure any vessel, vehicle, or merchandise which shall become liable to seizure, and to arrest any person who shall become liable to arrest, by virtue of any law respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.

(g) Any vessel, within or without the customs waters, from which any merchandise is being, or has been, unlawfully introduced into the United States by means of any boat belonging to, or owned, controlled, or managed in common with, said vessel, shall be deemed to be employed within the United States and, as such, subject to the provisions of this section.

(h) The provisions of this section shall not be construed to authorize or require any officer of the United States to enforce

This power given by Congress to customs agents allows them to search without probable cause.[11]

Although labeled a mere "administrative search" the tag is rather misleading, fruits of the search may lead to criminal indictments.

(Footnote 10 concluded)

any law of the United States upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government. June 17, 1930, c. 497, Title IV, § 581, 46 Stat. 747; Aug. 5, 1935, c. 438, Title II, § 203, 49 Stat. 521; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; Sept. 1, 1954, c. 1213, Title V, § 504, 68 1141."

19 U.S.C. Sec. 1467:

"Whenever a vessel from a foreign port or place or from a port or place in any Territory or possession of the United States arrives at a port or place in the United States or the Virgin Islands, whether directly or via another port or place in the United States or the Virgin Islands, the appropriate customs officer for such port or place of arrival may, under such regulations as the Secretary of the Treasury may prescribe and for the purpose of assuring compliance with any law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, cause inspection, examination, and search to be made of the persons, baggage, and merchandise discharged or unladen from such vessel, whether or not any or all such persons, baggage, or merchandise has previously been inspected, examined, or searched by officers of the customs."

[11] The right of border search does not depend on probable cause. See *Carroll* v. *U.S.*, 267 U.S. 132 (1924); *Johnson* v. *U.S.*, 333 U.S. 10 (1948); *Boyd* v. *U.S.*, 116 U.S. 616 (1874); *U.S.* v. *Yee Ngee How*, 105 F. Supp. 517 (1952); *King* v. *U.S.*, 258 F.2d 754, *certiorari denied* 359 U.S. 939 (1958); *Murgia* v. *U.S.*, 285 F.2d 14, *certiorari denied* 366 U.S. 977 (1960).

The Virgin Islands' border, however, do not have all the ingredients usually included in the concept of an international frontier. Noticeably absent from the crossing of this intermediate border are passport checkpoints. The islands are also under American sovereignty, thus no international frontier has been crossed and yet a search without probable cause takes place.

For security purposes even an intrastate movement of passengers can open a person to a limited search such as in the aircraft hijacking cases. To that effect *U.S.* v. *López*, 328 F. Supp. 1077 (1971); *U.S.* v. *Epperson*, 454 F. 2d 769 (1972); *U.S.* v. *Moreno*, 475 F. 2d 44 (1977); *U.S.* v. *Doran*, 482 F. 2d 929, 932 (1973). *U.S.* v. *Cyzewski*, 484 F. 2d 509 (1973), *certiorari denied* 415 U.S. 902. See also 49 U.SC. 1357 (b), 1472 (1), 1511 (a)

Also in point are the cases of Gateway Military Inspections which allow the inspection of civilian and military personnel entering or leaving a base installation. *U.S.* v. *Lange*, 15 C.M.A. 486 (1965); *U.S.* v. *Brown*, 10 C.M.A. 482 (1959); *U.S.* v. *Florence*, 1 CMA 620 (1952).[12]

We are faced with the issue of whether for the purposes of the Fourth Amendment in an intermediate border situation Puerto Rico is in a peculiar situation like those of the Virgin Islands, Military Gateways or airports where antihijacking searches are made.

We cannot approach the problem of whether the Commonwealth should be allowed to conduct border searches by saying that Puerto Rico is just like any

[12] *Gateway Inspections. The Admissibility of Evidence Seized*, 19 A.F. Law Review 199-277 (1977).

other State for Fourth Amendment purposes. It is already not equivalent to any other state for certain other purposes. For example, some products of the island pay an excise tax upon arriving in the continental United States.[13] The Commonwealth Legislature is reciprocally entitled to levy tariffs on some goods imported into the island from the United States.[14] Agricultural Department inspections can also be made of the baggage of any arriving or departing passengers on flights between Puerto Rico and the continental United States.[15] It should be noted that the fruits of this so-called administrative search are admitted into the criminal indictments of the owners of the baggage.

[13] Title 1 L.P.R.A. sec. 9 reads:

"That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal-revenue laws other than those contained in the Philippine Trade Act of 1946: *Provided, however*, That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the Island shall be covered into the Treasury of Puerto Rico.—"

[14] 19 U.S.C.A. Sec. 1319—Duty on coffee imported into Puerto Rico

"The legislature of Puerto Rico is empowered to impose tariff duties upon coffee imported into Puerto Rico, including coffee grown in a foreign country coming into Puerto Rico from the United States. Such duties shall be collected and accounted for as now provide by law in the case of duties collected in Puerto Rico."

This section authorizes the Legislature of Puerto Rico to levy customs duties on coffee imported into Puerto Rico. (See *Pan Am.* v. *U.S.*, 177 F. Supp. 769 (1959)).

[15] 7 U.S.C. Section 161. Quarantine Protection Act. Sec. 318.58, section 8 of the Plant Quarantine Act of August 20, 1912.

Recently this Court in the case of *Joseph Califano* v. *Ceasar Gautier Torres*, et als, 76 L.W. 3539 (1978) has decided that Puerto Rico is not like New Jersey, Connecticut or Massachusetts or any other state for the purposes of welfare legislation.

Furthermore, under sections 9, 38 and 58 of the Federal Relations Act, Title 1 L.P.R.A. recognition is made of a special situation in the application of federal laws particularly tax and interstate commerce laws.

All of these pecularities of the Puerto Rican situation arise from the fact that the Treaty of Paris gave Congress broad discretionary powers over the island government, a power which this Court has left untouched. See *Downes* v. *Bidwell* 182 U.S. 244 (1901) Congress by explicit legislation or delegated power has created the uniqueness of the Puerto Rican situation.

The Commonwealth itself, as a political entity, has its origin in Public Law 600 of the 81st Congress entitled "An Act to provide for the Organization of a Constitutional Government by the People of Puerto Rico." Its preamble reads:

> "WHEREAS the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and
>
> "WHEREAS under the terms of these congressional enactment an increasingly large measure of self-government has been achieved: Therefore
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, that, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government of their own adoption." L.P.R.A., Vol. 1, pp. 136-137.

The body politic that eventually was created by mutual agreement between the Congress and the People of Puerto Rico is not a federated state, even though it is within the constitutional structure of the United States. Its creation responded to economic, political, ethnic, historical, cultural, and geographical realities. It is considered a unique entity [16] where, with limited incidence, laws and principles of federation operate with exceptions to the uniform standards that govern the States of the Union.

In view of the above the Commonwealth status creates borders between Puerto Rico and the Continental states that are neither interstate nor international borders, but a special situation. We conclude that the Fourth Amendment exception to a probable cause requirement as is presently found in international border searches should also be applicable to the Puerto Rican "border searches" as is already the case in the "border searches" at the United States Virgin Islands passengers arriving or departing from Puerto Rico or the States. Congress, under the powers granted by the Territorial Clause, has created a special, exceptional status.

It is also important to bear in mind that Puerto Rico is an island with clearly defined natural boundaries with problems peculiar to international frontiers, particularly, since its nearby neighbors as a whole are poor

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[16] *Mora* v. *Mejías*, 115 F. Supp. 610 (1953); *Wackenhut Corp.* v. *Aponte*, 386 U.S. 268 (1967); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, supra; *Examining Board of Engineers* v. *Flores de Otero*, supra; *Fornaris* v. *Ridge Tool Co.*, supra.

independent nations. This is precisely what encourages the illegal trade of weapons, drugs and illegal immigrants making of Puerto Rico the stepping stone for illegal traffic into and out of the United States. As Honorable Justice Diaz Cruz (Appellants Appendix A, p. 45) pointed out:

> "Puerto Rico is 3,600 square mile island completely surrounded by the international waters of the Caribbean Sea and the Atlantic Ocean. This results in a severance of the geographic continuity which merges 48 of the states of the Union into a single territorial body whose safety and order is protected by Congressional and state legislation. Hence, those states are not as vulnerable as Puerto Rico to the entry into their territories of smugglers and traffickers of illegal merchandise."[8]

[8] It is a known fact that Puerto Rico is the distribution center for all type of smuggled goods. Besides weapons and narcotics, the heavy traffic also includes diamonds, to such a point that Peter Hamill's New York Daily News syndicated column has called San Juan the 'dirty and dangerous centerpiece of the international diamond racket.' (San Juan Star, Oct. 21, 1977.)

To conclude, then, Puerto Rico has an "intermediate border" analogous to that of the Virgin Islands, requiring a pragmatic approach to peculiar situations.

II. "Searches without probable cause are a reasonable regulation of traffic in intermediate borders."

What is the rationale behind permitting the international border searches? The 15 Columbia Journal of Transnational Law 2777-3112 (1976) clearly outlines the backgrounds for this exception to the Fourth Amendment, which reads as follows:

> "The United States Supreme Court, early in the nation's history, characterized the right of each sovereign member of the international community to exercise jurisdiction over its territory as 'necessarily exclusive and absolute.'" Inherent in this sovereign capacity of every nation is the right to protect its territorial integrity through the exclusion of foreign nationals."[15]—Accordingly, travelers may be stopped in crossing an international boundary, the Court noted in 1925,
>
> > because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[16]

The nature and magnitude of the illegal alien problem have, however, necessitated official action at points other than the actual border or its functional equivalents. The number of illegal aliens currently residing in the United States has been estimated to be between ten and twelve million.[17] Approximately 85 percent of these are probably Mexican nationals,[18] an estimate corroborated by the fact that 92 percent of the deportable aliens arrested in 1974 were Mexican nationals.[19] Since 1970, the rate of increase in the number of illegal Mexican immigrants apprehended in this country has been over twenty percent each year; in fiscal 1973 alone, 498,123 deportable Mexicans were arrested by Border Patrol agents.[20]

Both the physical characteristics of the actual border area [21] and the practical demands on manpower allocation [22] dictate that some stopping of traffic take place at locations near, but not at the border. Accordingly, for almost a quarter of a century, agents of the Border Patrol have been granted extensive statutory authority both to stop and to search vehicles, without warrant, in the

course of their duties.[23] Significantly, the power to stop and interrogate suspects has been exercised over a broader geographical area than the power to search. Warrantless searches of vehicles by officers of the Immigration and Naturalization Service (INS) are permitted under section 287 (a) (3) 'within a reasonable distance from any external boundary of the United States.'[24] In contrast, the power to stop and conduct inquiries as to citizenship in the course of a Border Patrol investigation exists without geographical restriction. Under section 287 (a) (1), agents authorized under regulations prescribed by the Attorney General may 'interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.'[25] (Footnotes omitted)

A case in point is that of *U. S.* v. *Glaziou,* 402 F. 2d. 8 (1968) where once again the rational behind border searches was explained.

> ". . . Both Congress and the Courts have long appreciated the peculiar problems faced by customs officials in policing our extensive national borders and our numerous, larger international port facilities . . . Realization of customs officials' special problems has resulted not only in the Courts' giving the broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officers . . . but has also resulted in the application of special standards . . ." (p. 12)

There is a weighty Puerto Rican interest in overseeing entries across its boundaries, including searches without probable cause.

The legislation under consideration has its origin in the determination of the Commonwealth Legisla-

ture in its seventh special summer session of 1975[27] which in part stated:

> "Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.
>
> It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law. The Federal Government does not require these passengers or crew to go through the Customhouse after arrival in the Island for inspection of their luggage or person. This has contributed greatly to an increase in the smuggling of firearms, explosives, and narcotic drugs by this (*sic*) means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship (sic).
>
> The inspection of luggage, cargo and persons to reduce the introduction of firearms, explosives, and narcotic drugs illegally brought from the United States to Puerto Rico is a legitimate area of control on the part of our government in exercising its police power, especially when the same is not covered by the Federal Government, and there is no conflict of authority on this matter between both governments."

Thus Puerto Rico's Legislature acknowledged the existence of a serious public safety problem caused by the illegal introduction of firearms, explosives and narcotics drugs through our airports and docks by passengers and crew members arriving from the

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[27] Public Law No. 22, supra.

United States. The need arose for the government of the Commonwealth to set up "some sort of effective and corrective measure to eliminate this increasing illegal traffic which was progressively becoming more profitable, in view of the fact that there was no control on the part of the United States government".[18]

The Act was thus adopted to take a stand against the helplessness of the country in the increasing traffic of weapons, drugs and explosives. It was enacted as ". . . society's urgent and critical protective measure against the appalling degree of violence that has quashed people's right to life, freedom and property. It was not enacted as a hysterical reaction, but responding to a state of anguish and insecurity that has befallen Puerto Rico. . ." (See Mr. Justice Díaz Cruz, Appellants Appendix A p. 53).[19]

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[18] See Appellant's Jurisdictional Statement, Appendix C, pag. 112.

[19] The grave criminality problems which Puerto Rico faces are clearly depicted in various opinions of several Justices of the Supreme Court of Puerto Rico. For example Justice Martin (Appellant Appendix A, p. 60 p. 63) says:

> "The defenselessness of our borders is evident. The increase in criminality mostly imported, evinced by the great number of crimes connected with unregistered weapons, as well as those related to controlled substances and explosives, forced the Legislature to take measures to effectively fight criminality through said Act 22 and consequently, to protect the security of and bring peace to the citizenry." (P. 60)
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> ". . . The statement of motives of this Act reveals the crisis the country is going through as a result of the crime wave which is greatly due to the ease with which weapons, explosives, and controlled substances are obtained and to the inevitable impunity with regard to the offenders . . ." (P. 63)

(Footnote 19 continues on facing page)

The law under scrutiny is but part of an extensive governmental effort to counter the criminal tide that has overtaken the island commonwealth. In the Justice Reform of 1975 the Commonwealth government took drastic action for the reduction and restriction of the sales use of weapons. (Title 25 LPRA, Secs. 432 412, 415, 418(a), 436, 438, 440, 444, 449)

To cope with this situation the first section of the particular Act that concern us here provides:

> "The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States, to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances".

Again Justice Negrón García (Appellants Appendix A. pág. 97) points out:

> "Likewise, the inspection in search for drugs, represents another effort by Puerto Rico to avert an evil which is destroying the foundations of our society. There is a close relationship between the traffic and use of narcotics and the rise in criminality throughout the country. The common citizen no longer feels safe in his home, in his car, nor when walking through the streets; but not because of the use and traffic of narcotics in itself, but because of the carrying and use of lethal weapons by individuals related to their illegal commerce. The attention caught by the criminal aspects of the traffic and use of narcotics has diverted the knowledge of the true finality of laws on drugs, whose objective is preventing their use because of the threat to public health. We have seen, when discussing state power to inspect, that the protection of public health is a valid constitutional exercise of this power". (P. 97)

It is evident from its text that the Police is authorized to carry out two different activities at airports and docks—namely the inspection of luggage, packages, bundles and cargo which does not require "reasonable grounds" and the detention, questioning and search of individuals with regard to which there reasonable grounds to believe that they are illegal carrying about their persons firearms, explosives, narcotic substances or similar substances.

It is thus our contention that the Legislature acted in the valid exercise of its power to protect the life and property of the People of Puerto Rico. As clearly set out in the case of *Commonwealth* v. *Rosso,* 95 P.R.R. 488, 523-4 (1967) the power of the Commonwealth to protect the safety of its residents "is consubstantial with its existence as a state and inseparable from its police power".

The state power to establish inspection laws has been accepted by the Constitution as well as by the case law of the Federal law of the Federal Supreme Court. Article 1, Sec. 10, paragraph 2, of the Constitution of the United States, insofar as pertinent provides:

> "No state shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . ."

Since *Gibbsons* v. *Ogden,* 9 *Wheaton* 1, 203, 6 L. Ed. 23 (1824), the Supreme Court spoke in the following terms with regard to state power over inspection laws:

> "But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution, as being passed in the exercise of a power remaining with the states. That inspection laws . . . form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass".

Thus the Supreme Court acknowledges that the constitutional provisions not only establishes the right of states to adopt inspection laws, but tacitly grants the right to prohibit exportation and importation of certain articles. Obviously this right to prohibit includes dangerous or harmful articles.

In this context Act No. 22, as attacked in this case, is a type of inspection law which authorizes the examination of luggage with the purpose of enforcing laws against weapons, explosives, and drugs.

The four member opinion of the Supreme Court of Puerto Rico said that to give Puerto Rico the power to search passengers arriving in the islands ports and airports would give the Commonwealth a power that no other state has. This argument avoids the reality of Puerto Rico's peculiar situation. Many states of the union which do not have actual geographical frontiers with either Canada, Mexico or the Soviet Union are not therefore deprived of search powers given populous frontiers states like California, Texas and New York.

The state's power to remove and destroy explosives under its police power and possible under inspection laws was accepted in the opinion of the Supreme Court delivered by Justice Marshall in *Brown* v.

Maryland, 12 Wheaton 419, 443, 6 L. Ed. 678, 687 (1827) wherein the following was stated:

> "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. . . . We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power. . ."

In the *Mayor of the City of N.Y.* v. *Miln,* 11 Peters 102, 139-142, 9 L. Ed. 648, 662-664 (1937) one undoubtedly notes the state inspection powers:

> ". . . That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends. . . That all those powers . . . what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."
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> ". . . We suppose it to be equally clear, that a state has as much right to guard, by anticipation, against the commission of an offence against its laws, as to inflict punishment upon the offender, after it shall have been committed. The right to punish, or to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just

> have set his foot upon the soil of the state, is just as subject to the operation of the law, as one who is a native citizen."
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> * * *
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> ". . . The power to pass inspection laws, involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound or infectious, to cause them to be removed, or even destroyed. But the power to pass these inspection laws, is itself a branch of the general power to regulate internal police."

We understand that the state power is essential to that a soverign nation; that inspection laws are part of power; that these laws include the power of inspection, removal, and destruction and that the police power embraces crime prevention even with regard to people coming from abroad.

The power of inspection also covers the power to inspect articles coming from other states. This was sustained by this Honorable Court in *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U.S. 345, 357 (1897) upon stating:

> "Whenever inspection laws act on the subject before it became an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection commonly called police power."

Said Court also acknowledged the power of the states to forbid the introduction of articles that are not in legal commerce. In *Compagnie Francaise* v. *State Board of Health, Louisiana,* 186 U.S. 380, 391 (1902),

the Court rephrased the standard stated in several cases:

> "... it was held that a state law absolutely prohibiting the introduction, under all circumstances of objects actually affected with disease, was valid because such objects were not legitimate commerce ... the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce."

Recently the state power to adopt inspection laws was reaffirmed in *California* v. *Thomson*, 313 U.S. 109, 114 (1941), which holds that the states may adopt inspection laws applicable to articles in interstate commerce as long as said laws do not substantially obstruct or discriminate commerce and Congress has not occupied the field. We must emphasize that nobody questions whether the inspection of the luggage of a passenger arriving at Puerto Rico is a matter on which Congress has legislated; the Federal Government has not occupied the enforcement area assigned to the Police of Puerto Rico by the challenged statute.

Less than a year ago the Supreme Court, through a summary action, denied an appeal questioning the constitutionality of an inspection law of the State of Florida as to (1) the authority it granted to stop transporters on state roads for inspection of agricultural products without there being probable cause or suspicion that they were carrying agricultural products, and (2) the authority to conduct a search both unreasonable and contrary to the right of privacy and the right to travel freely. The appeal is summarized in 46 L.W. 3005 as denied in 46 L.W. 3130 (Session of October 3, 1977). The case sustains that "appellee has full

authority under the police power of the State of Florida to conduct agricultural inspection of the vehicles" and it ends saying: "It is our view that the requirement of the foregoing statute that all trucks and trailers stop at the inspection stations of appellee for agricultural inspection is entirely reasonable and is a valid exercise of the police power of the state. *Stephenson* v. *Department of Agriculture & Consumer Service*, 342 So. 2d 60 (1977).

The principles stemming from the commented case law, establish that the state's Police Power is like that of sovereign nations, and it embraces: a) the prevention of crime even as to foreigners entering the state, b) the revision and destruction of explosives; and c) the prohibition of entry of article excluded from legal commerce. In short, inspection laws derive from this police power and include such powers as the power to search without probable cause and to restrict and to forbid the entry of articles from other states, as long as said laws do not discriminate or obstruct interstate commerce substantially.

The case at bar demands "... the composure (necessary) to fuse the rights of the individual which if unrestrained could be conflictive among themselves and the right of the community—represented by the Legislature—to life, health, and welfare". 4 *Diario de Sesiones de la Convención Constituyente* (Journal of Proceedings of the Constitutional Convention) 2576 (1961 ed.).

The Act authorizes routine and random searches of luggage and bundles at point of entry in our island such as airports and docks which we have already classified as intermediate borders. We are thus faced with

the state's interests in curbing the arrival at our shores and airports of destructive, degrading instruments with the right of those arriving not to have their luggage searched.[20] It is our contention then that the individual rights to privacy should yield to the preponderant right to protection of the life and property of the vast Puerto Rican community and that a balance should be present between society and community interests versus the individual's interests.[21] In final analysis one must conclude that the measures taken by the Commonwealth in restricting the importation of illegal drugs and arms were reasonably related to the danger they seeked to control and are within the more ample exception that the intermediate frontier allows.

The expectation of privacy of a person boarding a plane is not the same as that expectation in not having his home searched.

In view of the mobility of the populations, of the modern means of transportation and communication, the terror of hijacking and the abuses of illegal traffic, airport searches have become generalized to the point that individuals entering the nation and those boarding planes on the nation know and realized they have no expectation of privacy in these cases. As the Supreme

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[20] The island government has kept in mind the activities of the F.L.N. terrorists movement in the continental United States and has sought to prevent its proliferation in Puerto Rico itself.

[21] It must be noted that in the case at bar no abusive act was mentioned as to the way the defendant was stopped. The search was limited to the two suitcases in which a bag of marihuana was found along with the pipe containing residues of said narcotic and two hundred fifty thousand dollars ($250,000) in cash. Thus, this is a clear case in which a slight inconvenience to the passenger should yield to the welfare, security and health of the community. The reduced intrusiveness of the stop being then significant in the determining the propriety of the stop.

Court said in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376:

> "... a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country."

Lately on the case of *United States* v. *Chadwick*, decided on June 21, 1977, 45 L.W. 4797, this Honorable Court held that the privacy expectancies in luggage are greater than those existing with regard to an automobile, yet it also stated that baggage may be exposed to public view as a requirement for entry at borders or when traveling on a vehicle. The latter validates searches of suitcases belonging to individuals traveling on commercial airplanes.

Insofar as to the right to travel question this right has been consistently weighed against compelling interest of the state in order to justify its restrictions. In this case the compelling interest is that of combating the criminal tide that threatens directly the welfare of the people who live in Puerto Rico and indirectly the totality of the American population.

Finally, the fourth Amendment was not adopted to impose intellectual nearsightness on the states in handling the serious problems that threaten their internal security.

One cannot but echo Justice Diaz Cruz, (Appellant Appendix A pp. 54, 57) idea on the contemporaneous vitality of the Constitution when he argues:

> "A court should not abstain from making the constitutional law that the times demand. The great value of the Constitution of the United States as supreme instrument of Law is largely due to the legal thought of the judges who have undertaken its interpretation throughout two centuries. On his day, each one faced the problems of his epoch. Their decisions, preserved for the ones that followed, enjoy the prestige of their intelligence analyzing and declaring the Law as they understood it. Nevertheless if any one element has influenced the development of Constitutional Law, it has been the free exercise of the creativity of judges who did not confine their adjudicative power to concepts already enunciated before them, nor did they lock it up in the *conceptual prison of stare decisis*. As in any other area, Constitutional Law precedents help to direct the though of future generations, but not to fetter and paralyze the thought and the deliberative power at the moment in which they were produced. If North American constitutional criterion had come to a standstill, set on anachronical precedents, the nation would have not attained the political and personal freedom enjoyed by its citizens. That there is but one text of the Constitution, varied by the way it has been understood by different generations of judges, is evidence in the broadening of the concept of "due process" contained in the Fourteenth Amendment. . . . Such varied pronouncements, some of which seem unusual to us today, responded to the judicial thought of the time, inevitably molded by ethical and moral concepts, and social needs of the time. The evolution of civilization and continuous progress and the new challenges to legal order, require a renewed constitutional law fit

> for our times, exercised freely and unencumbered by resonant precedents, some of great humanitarian content, but ineffective today to protect the Constitution from its critics. Democracy and freedom are not defended by swan songs or odes that had their time and place but that today are mere refrains for minstrels. The value of the Constitution lies in its vital content of liberty which will last as long as judges who carry it in their heart discover its contemporaneousness."

Considering the alarming Puerto Rican crime situation we think the Puerto Rico's Legislature has not exceeded Constitutional restraints by allowing searches without probable cause to be conducted on baggage entering its border ports and airports.

CONCLUSION

For the reasons above set forth, it is respectfully requested that this appeal be dismissed and/or the judgment affirmed because the appeal as a whole does not present a substantial federal question and/or because at least one federal question sought to be reviewed was not timely or properly raised nor expressly passed on.

Respectfully submitted,

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Solicitor General

ROBERTO ARMSTRONG, JR.
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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

No. Cr-77-24

THE PEOPLE OF PUERTO RICO, *Plaintiff and appellee*

v.

TERRY TEROL TORRES LOZADA, *Defendant and appellant*

Judgment of the Superior Court, San Juan Part,
Charles E. Figueroa, Judge

Article 404, Controlled Substances Act

Motion for Reconsideration

TO THE HONORABLE COURT:

Comes now appellant, Terry Terol Torres Lozada, represented by the undersigned, one of his attorneys, and very respectfully prays this Honorable Court to reconsider its decision rendered on December 14, 1977, sustaining the legality of Act No. 22 of August 6, 1975 (25 L.P.R.A. § 1051) and affirming appellant's conviction for possession of marihuana.

In support of this motion appellant states the following:

1. On December 14, 1977 this Honorable Court affirmed the conviction of appellant, who was stopped and searched under said Act No. 22. Four justices of this Honorable Court stated their opinion in the sense that appellant's conviction violated the Fourth Amendment of the United States Constitution. Three justices of this Honorable Court stated that appellant's rights under the Fourth Amendment were not violated. One of the justices of this Honorable Court, Honorable Marco A. Rigau, took no part in the consideration and decision of the case.

Although the majority of the members of this Honorable Court who sat in the case were of the opinion that said Act No. 22 is unconstitutional, the Court held that it could not declare said Act unconstitutional because Article 5, Section 4, of the Constitution of the Commonwealth of Puerto Rico requires the vote of the majority of the justices who compose the Court in order to declare a law unconstitutional. Although this Honorable Court is composed of eight justices, one of them, Hon. Marco A. Rigau, took no part in the case.

2. On December 21, 1977 appellant filed a notice of appeal and a motion to stay the mandate while the case was appealed before the Honorable Supreme Court of the United States. On January 11, 1978, appellant filed an amended notice of appeal and requested the translation and remittance of the record of the case to the Honorable Supreme Court of the United States.

3. On March 1, 1978, Hon. Justice William J. Brennan, Jr., of the Honorable Supreme Court of the United States granted appellant an extension up to and including May 13, 1978 to docket his appeal and/or to file a petition for a writ of certiorari before the Supreme Court of the United States. On April 4, 1978, the Clerk of the Supreme Court of Puerto Rico delivered the English translation of the record of this case to appellant's attorneys.

4. On or about April 4, 1978, the famous opera singer Justino Diaz was arrested at Isla Verde International Airport, after he was searched under said Act No. 22. His arrest caused a controversy in the Island and drew attention again on the constitutionality of said Act No. 22.

5. On April 11, 1978, a news report published in the newspaper "El Mundo" informed that Hon. Justice Marco A. Rigau was willing to pass judgment and vote on Act No. 22 of August 6, 1975. A copy of said news report is attached to this motion as part of the sworn statement included with and made part of the same.

6. Appellant has requested the Honorable Supreme Court of the United States to review the decision of this Honorable Court sustaining the constitutionality of said Act No. 22. He has also requested review of the decision on the basis that Article 5, Section 4, of the Constitution of the Commonwealth of Puerto Rico violates the requirement of due process of law guaranteed by the United States Constitution. We understand, however, that since Hon. Justice Marco A. Rigau is willing to pass judgment and vote on the question raised, the interests of justice are best served if this Honorable Court agrees to reconsider the decision in this case, with the participation of the aforementioned justice.

7. Besides the foregoing, appellant prays this Honorable Court to reconsider its decision affirming the judgment appealed from in the absence of the absolute majority required by the Constitution to invalidate said Act No. 22. The fact that the court allowed only seven out of the eight justices who make up the Court to sit in the case, deprived appellant of the due process of law guaranteed by the Constitutions of the United States and of Puerto Rico. Appellant's due process of law was further restricted when, notwithstanding the requirement of absolute majority of the total of justices who compose the Court the case was submitted to the consideration of only seven justices, particularly when appellant's only opportunity to learn of this situation was after the judgment was rendered. Appellant did not raise this issue in his brief, since he could not anticipate that since the Court was made up of eight justices, only seven of them would sit in a case which, by constitutional provision, required at least an absolute majority of the justices who make up the Court.

Besides depriving appellant of his right to the due process of law on appeal, Article 5, Section 4, of our Constitution, as it was applied in this case, deprived appellant

of his right to a full and fair hearing as required by the case of *Stone* v. *Powell,* 428 U.S. 465, 49 L.Ed.2d 1067; 96 S. Ct. 3037.

8. Should this Honorable Court decide to reconsider its decision appellant binds himself to withdraw the appeal as soon as that decision is taken.

9. Should this Honorable Court consider that its Rules do not provide for a situation as the one under consideration, appellant prays that this Court exercise the authority conferred by Rule 50 of said Rules, on the ground that this is one of the cases to which said Rule refers.

WHEREFORE, appellant respectfully prays this Honorable Court to reconsider its decision of December 14, 1977 in accordance with the statements set forth in this motion.

In Mayaguez for San Juan, Puerto Rico, this 14th day of April 1978.

I CERTIFY: That on this same date I have served a copy of the foregoing motion upon the Honorable Solicitor General, Department of Justice, Box 192, San Juan, Puerto Rico.

CELEDONIO MEDIN LOZADA
CELEDONIO MEDIN LOZADA GENTILE
Attorneys for Defendant-Appellant
133 Leon Street
Mayaguez, Puerto Rico

(Sgd.)
By: CELEDONIO MEDIN LOZADA

SWORN STATEMENT

I, CELEDONIO MEDIN LOZADA, of age, married, lawyer, and resident of Mayaguez, Puerto Rico, do hereby state under oath:

That the news report attached herein, headlined: "Justice Says Willing to Vote on Act Authorizing Airport Searches" was publshed in the newspaper "El Mundo" in the edition of Tuesday, April 11, 1978, and clipped from said newspaper and attached to the "Motion for Reconsideration."

Mayaguez, Puerto Rico, this 14th day of April 1978.

(Sgd.) CELEDONIO MEDIN LOZADA

AFF. NO. 2731

Sworn to and subscribed before me by Celedonio Medin Lozada, of the aforesaid personal circumstances, personally known to me, in Mayaguez, Puerto Rico, on this 14th day of April 1978.

(Sgd.) MIGUEL HERNANDEZ COLON
NOTARY PUBLIC

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

(Caption omitted in printing)

Resolution

San Juan, Puerto Rico, May 4, 1978

Appellant's motion for reconsideration is hereby denied.

It was so agreed by the Court and certified by the Chief Clerk. Mr. Justice Rigau took no part in this decision.

(Sgd.) ERNESTO L. CHIESA
Chief Clerk

CHIEF CLERK'S CERTIFICATE

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed document is a true, exact and official translation from Spanish into English (said official translation having been made under the authority of Act No. 87 of May 31, 1972), of the Resolution rendered by this Court on May 4, 1978 in the above-entitled case (Cr-77-24), the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF, and at the request of the interested party, I issue these presents for official use, free of charge, under my hand and the seal of this Court, in San Juan, Puerto Rico, this 28th day of June 1978.

/s/ ERNESTO L. CHIESA
Chief Clerk
Supreme Court of Puerto Rico

COMMONWEALTH OF PUERTO RICO

SUPREME COURT

OFFICE OF THE SECRETARY

SAN JUAN, PUERTO RICO

Chief Clerk's Certificate

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed document is a true and faithful translation from Spanish into English of the Motion for Reconsideration, which is part of the record in case Cr.-77-24 *The People of Puerto Rico* v. *Terry Terol Torres Lozada,* of April 14, 1978, the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF and at the request of the Office of the Solicitor General of Puerto Rico, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 30th day of May, 1978.

/s/ ERNESTO L. CHIESA
Ernesto L. Chiesa
Chief Clerk
Supreme Court of Puerto Rico

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF AUTHORITIES

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OCTOBER TERM, 1977

NO. 77-1609

TERRY T. TORRES,

Appellant,

vs.

COMMONWEALTH OF PUERTO RICO,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, appellant files this brief in opposition to appellee's Motion to Dismiss or Affirm.

The Motion to Dismiss or Affirm fully illustrates and supports appellant's contention that the issues presented are indeed substantial. Moreover, contrary to appellee's argument, appellant properly raised below the subsidiary issue of denial of due process by the Puerto Rico Supreme Court.

1. Appellee's Motion Fully Demonstrates the Substantiality of the Federal Issues Presented.

Appellee does not dispute that Public Law No. 22 provides blanket authorization for police to "inspect the luggage, packages, bundles and bags of passengers" entering Puerto Rico from the United States, or that it empowers police to "detain, question and search those persons whom the police have ground to suspect of illegally carrying firearms, explosives, narcotic substances . . . stimulants or similar substances." (Public Law No. 22 is set out in full at Appendix F of the Jurisdictional Statement.) Similarly, appellee does not dispute the interpretation of the Supreme Court of Puerto Rico that Public Law 22 authorizes "indiscriminate" warrantless searches, "without reasonable

grounds" of persons as well as property, "for the purpose of instituting criminal prosecutions." (Jurisdictional Statement Appendix A at pp. 3, 22, 13.)

Appellee also concedes that the boundary between the United States and Puerto Rico "clearly does not reach the category of an international border." (Motion to Dismiss or Affirm at 17.) Routine customs searches at international borders have, of course, been upheld, Almeida-Sanchez v. United States, 413 U.S. 266 (1973), although unregulated police border searches for the sole purpose of criminal prosecution have not been specifically approved by this Court. Appellee assumes that the search in question would be constitutional at an international border and it argues that Puerto Rico should be considered an "intermediate border" (Motion at 23-24) at which similar warrantless searches should be allowed. Moreover, it argues by implication that the Commonwealth of Puerto Rico has the unilateral power to create such an "intermediate border," without regard for the Congress or Executive Branch of the United States. It is, to say the least, a startling proposition.

Appellee's alternative assertion that the search below was "administrative" ignores the clearly stated purpose and effect of Public Law 22 and the Puerto Rico Supreme Court's authoritative interpretation of that statute. See, Jurisdictional Statement at 13-15.

In any event, however, this Court has only this term again sustained the warrant requirement in administrative searches in Marshall v. Barlow's, Inc., ___ U.S. ___, 56 L.Ed.2d 305 (No. 76-1143, May 23, 1978). Appellee's attempt to depart from that requirement raises a substantial federal question.

Appellee's attempt to justify warrantless searches because of "serious problems that threaten . . . internal security"[1] similarly departs from the essential Fourth Amendment premise that the seriousness of the crime or threat does not justify abrogation of the warrant requirement. See, Mincey v. Arizona, ___ U.S. ___, 57 L.Ed.2d 290 (No. 77-5353, June 21, 1978).

Finally, appellee ignores altogether the effect of Public Law 22 on the right to travel. In Califano v. Torres, ___ U.S. ___, 55 L.Ed.2d 65 (per curiam)(Feb. 27, 1978), the Court considered a challenge to a statutory exclusion of residents of Puerto Rico from certain Social Security Income benefits. The petitioner (no relation to appellant) had lost benefits because he moved from Connecticut to Puerto Rico. Although upholding the exclusion, this Court "assumed" that the right to travel between the United States and Puerto Rico is no different from the right to travel among the several states:

1/ Motion at 37.

The constitutional right of interstate travel is virtually unqualified. United States v. Guest, 383 U.S. 745, 757-758, 16 L.Ed.2d 239, 86 S.Ct. 1170; Griffin v. Breckenridge, 403 U.S. 88, 105-106, 29 L.Ed.2d 338, 91 S.Ct. 1790. By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. Kent v. Dulles, 357 U.S. 116, 125, 2 L.Ed.2d 1204, 78 S.Ct. 1113; Aptheker v. Secretary of State, 378 U.S. 500, 505-506, 12 L.Ed.2d 992, 84 S.Ct. 1659. As such, this "right," the Court has held, can be regulated within the bounds of due process. Zemel v. Rusk, 381 U.S. 1, 14 L.Ed.2d. 179, 85 S.Ct. 1271. For purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.

> Califano v. Torres, supra, 55 L.Ed.2d at 69, fn. 6 (Emphasis added).

Although it moves to affirm, appellee does not, in the body of its argument, even argue that the federal Fourth Amendment questions are not substantial. (Motion at 16-39.) Appellee's final call for "the exercise of

the creativity of judges" and for rejection of "the conceptual prison of stare decisis"[2/] serves only to illustrate the substantiality of the federal questions presented.

2. The Procedures Imposed on the Puerto Rico Supreme Court by its Constitution Raise a Substantial Federal Question, One Which Was Properly Raised in the Puerto Rico Supreme Court.

Although a majority of the seven justices who heard the case believed Public Law No. 22 to be unconstitutional, appellant's conviction was nonetheless affirmed because the Puerto Rico Constitution requires the vote of 5 of the 8 appointed members before a law may be declared unconstitutional. Appellee argues that this issue was not raised below because appellant's Motion to the Puerto Rico Supreme Court for reconsideration was not timely. (Motion to Dismiss or Affirm at 8; the motion for reconsideration is reproduced at Appendix A of the Motion to Dismiss or Affirm) Further, it argues that, in any case, a petition for rehearing does not raise the issue in the Court below, unless the petition has been granted. Id. at 9.

It is beyond dispute, however,

2/ Motion at 38-39, quoting from Judge Diaz Cruz below.

that appellant could not have raised the issue before the judgment of the Puerto Rico Supreme Court had been rendered. He had no idea who would participate or what the vote would be. Nor is it disputed that the Puerto Rico Supreme Court had jurisdiction to reconsider the matter when appellant's untimely petition was filed. Rule 45(d) of the Rules of the Puerto Rico Supreme Court (quoted in the Motion at 7) expressly provides for consideration of untimely petitions for reconsideration so long as "execution of the mandate" is not adversely affected. Since the Puerto Rico Supreme Court had already stayed the mandate pending appeal to this Court, the mandate could not have been adversely affected by that Court's reconsideration.

The Puerto Rico Supreme Court had the opportunity to consider the issue. It chose not to. The cases cited by appellant all deal with federal issues which could have been presented to the lower court at an earlier stage, but were presented for the first time on petition for rehearing. Since appellant could not have presented this issue prior to judgment and since he did so after judgment, he raised the issue in sufficient time to meet the requirements of Rule 16(b). Indeed, in Ohio ex. rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 79 (1930), the continuing validity of which is called into question by this part of the appeal, the issue was, of course, raised for the first time after judgment, and it was fully considered on the merits by this Court. See, Great Northern R.

Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 366-7 (1932); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 677-8 (1930).

Appellee's citation of Campbell v. Supreme Court of Florida, 428 F.2d 449 (5th Cir. 1970) (summary calendar), is of no help on the merits. Campbell sought relief from a unanimous ruling against him, claiming Florida procedure had not been followed. Here, the majority favored appellant's position, but entered judgment against him because of the challenged state constitutional provision. This bizarre result raises a substantial federal question.

CONCLUSION

Summary reversal of the result below would be fully consistent with the Fourth Amendment. Any other result would be such a departure from established precedent as to warrant plenary consideration. For the aforementioned reasons and those set forth in the Jurisdictional Statement, the Court should note probable jurisdiction and either vacate the opinion below and remand for reversal of the conviction or set the case for plenary consideration of the substantial federal question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR THE APPELLANT

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ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the Supreme Court of Puerto Rico was originally rendered in the Spanish language. It is reported in Spanish at 112 Colegio de Abogados 77. A true copy of the official English translation by the Supreme Court of Puerto Rico is reproduced as Appendix A to the Jurisdictional Statement at pages 1-98. The English translation of the Judgment of the Supreme Court of Puerto Rico affirming appellant's conviction is reproduced as Appendix B to the Jurisdictional Statement at pages 99-100.

The opinion of the Superior Court of the Commonwealth of Puerto Rico, San Juan Part, was originally rendered in the Spanish language and is unreported. An

official English translation of that opinion was prepared by the Supreme Court of Puerto Rico and is reproduced as Appendix C to the Jurisdictional Statement at pages 101-17.

Jurisdiction

In the criminal trial below, appellant challenged the validity of Public Law No. 22, 25 L.P.R.A. §§ 1051-1054, a statute of the Commonwealth of Puerto Rico, on the grounds that it is repugnant to the Constitution and laws of the United States. On December 14, 1977, the Supreme Court of Puerto Rico affirmed appellant's conviction and sustained the validity of that law. The notice of appeal was filed on December 21, 1977. An amended notice of appeal was filed on January 11, 1978. On March 1, 1978, Mr. Justice William J. Brennan, Jr. issued his Order extending to and including May 13, 1978, the time to file a jurisdictional statement and/or to petition for certiorari. The Jurisdictional Statement was filed on May 12, 1978. Probable jurisdiction was noted on October 2, 1978. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1258(2) and (3). *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42, n. 1 (1970) (*dicta*), sustains this Court's appellate jurisdiction.

Constitutional and Statutory Provisions Involved

The validity of Public Law 22 of August 6, 1975, 25 L.P.R.A. §§ 1051-1054 and of Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico are challenged herein. The operative part of Public Law 22 is set forth below:

> The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.
>
> 25 L.P.R.A. § 1051 (West 1975).

Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico provides as follows:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

The other constitutional and statutory provisions involved and the full text of Public Law No. 22 are set forth in the Appendix hereto.

Questions Presented

1. Whether Puerto Rico constitutionally may enact and enforce a law that authorizes the indiscriminate, warrantless search and seizure, without probable cause, of persons and property arriving in Puerto Rico from other parts of the United States.

2. Whether Puerto Rico constitutionally may create a *"de facto"* international border between itself and other parts of the United States.

3. Whether Public Law No. 22, 25 L.P.R.A. §§ 1051-1054, unlawfully abridges the right to travel by subjecting individuals to indiscriminate, warrantless searches without probable cause upon entry into the Commonwealth of Puerto Rico from other parts of the United States.

4. Whether Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico violates the Due Process and Supremacy Clauses of the United States Constitution by precluding the Supreme Court of Puerto Rico from reversing appellant's conviction for possession of marihuana, even though a majority of the justices who heard the case were convinced that the conviction was obtained in violation of the Fourth Amendment to the United States Constitution.

Statement of the Case

On August 6, 1976, appellant arrived at Puerto Rico's Isla Verde Airport aboard Eastern Airlines' Flight 915, non-stop from Miami, and went to the baggage claim area to pick up his luggage. The trial court found that he "seemed somewhat nervous, followed with his eyes the movements of agent Ruben Marcano, who was on duty at the International Airport wearing full uniform and carrying his service revolver at that checkpoint for passengers coming from the United States." Opinion of the Honorable Charles E. Figueroa, Judge of the Superior Court (Juris. St., App. C at 103). A second agent, Marcelino Santiago

of the Division for the Search and Patrol of Ports and Airports of the Criminal Investigations Bureau of the Police of Puerto Rico, noticed that appellant seemed nervous. Agent Santiago was in plain clothes. *Id.*

As appellant was leaving the baggage area with his luggage, agents Santiago and Marcano approached appellant, identified themselves and presented a card describing their authority pursuant to Act No. 22 of August 6, 1975, 25 L.P.R.A §§ 1051-1054 [hereinafter "Public Law 22"], the operative section of which provides:

> Authorization to Inspect
>
> The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

Appellant objected to any search of his luggage and insisted on calling his uncle, an attorney in Puerto Rico. Agent Marcano told him he would be entitled to call an attorney if he had committed an offense, but made clear to him that this "was only a routine baggage search, like that of all passengers inspected pursuant to Act No. 22 of August 6, 1975." (Juris. St., App. C at 104-05.)

The officers searched appellant's luggage, and in one of the suitcases they found a pipe and a paper bag containing approximately one ounce of marihuana. (Juris. St., App. C at 105.) Appellant was arrested and charged with a viola-

tion of Article 404 of the Controlled Substances Act of Puerto Rico. On August 31, 1976, the prosecuting attorney filed an information charging that appellant "unlawfully, willfully, maliciously, knowingly and/or intentionally, carried the controlled substance marihuana. . . ." Information, August 31, 1976.[1]

Prior to trial, appellant moved to suppress the marihuana and pipe on the grounds that the evidence was obtained in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, in violation of various Puerto Rico statutory and constitutional provisions and "[i]n violation of the case law established by the Supreme Court of Puerto Rico and by the Supreme Court of the United States of America." Motion to Suppress Evidence, Superior Court No. G 76-3105 (undated). The Court heard testimony on October 26, 1976. Appellant filed a post-hearing memorandum of authorities dated November 1, 1976, arguing the unconstitutionality of Public Law 22 under federal and Puerto Rico law.

[1] The trial and all proceedings below were conducted in the Spanish language. Pursuant to appellant's request, an English translation of the record in the Supreme Court of Puerto Rico was prepared and lodged with this Court. The pages of the translation are not numbered serially and will be referred to by description of the document and by the page number within the document as translated. All relevant documents were reproduced in either the Jurisdictional Statement or the Motion to Dismiss or Affirm. Pursuant to the Clerk's memorandum regarding appendices, the parties have not reprinted the lengthy opinions below. The parts of the record reproduced in the appendices to the Jurisdictional Statement or Motion to Dismiss or Affirm are referred to by their descriptions as well as to their page number in the respective appendix. The Joint Appendix contains only docket entries and will not be referred to herein. The Appendix to this brief containing statutory material will be referred to as "Appendix" or "App."

On December 22, 1976, the Superior Court issued its Resolution and Order (Juris. St., App. C at 101-17) denying the motion to suppress evidence. The court found that appellant's luggage was searched because he appeared "nervous" as he was "about to leave the baggage claim area," and that the inspection was based on Public Law 22. The court also adopted as findings the testimony of agent Marcano as follows:

> Agent Marcano also stated that, at the Isla Verde Airport there are warnings informing arriving passengers that their luggage may be inspected under Act No. 22 of August 6, 1975, and that there are no similar warnings in the airplanes and that he thinks, although he cannot categorically assert it, that there are no warnings regarding the effectiveness and scope of Act No. 22 of August 1975 in the airports from where the airplanes depart on their domestic flights. That his intervention was partly due to the defendant's conduct and to the way he was dressed, but was rather based on the authority granted by Act No. 22 of August 1975, and that the defendant was not a suspect.
>
> (Juris. St., App. C at 105-06.)

The trial court held that:

> [D]efendant's conduct, as observed by agent Marcano, and the information received from agent Santiago, do not constitute, in our judgment, the reasonable and supported grounds required of a law enforcement officer to justify, ordinarily, the arrest of a citizen in accordance with our case law, but we can consider it suspicious conduct that could justify a

> border search, in accordance with some cases in the federal case law.
>
> (Juris. St., App. C at 108-09.)

The trial court then upheld the search on the authority of "border" searches. (Juris. St., App. C at 110-15.) The trial court noted "a serious problem with the traffic and smuggling of narcotics, firearms and explosives on the part of individuals who travel freely between Puerto Rico and the United States" (Juris. St., App. C at 112); and that no customs or other inspection facilities are set up to inspect travelers between Puerto Rico and the United States, because Puerto Rico is part of the United States. (Juris. St., App. C at 112.) The court held that the border search doctrine should apply:

> . . . because of the peculiar condition of our island, the unrestricted ease with which American citizens travel from any point in the United States to Puerto Rico, and vice versa, the frequency with which domestic flights arrive at and depart from our airport, and also because the inspection carried out under [Public Law 22] is not covered by the federal government.
>
> (Juris. St., App. C at 115.)

The trial court sitting without a jury admitted the evidence, convicted appellant, and, on January 7, 1977, sentenced him to one to three years' imprisonment. Judgment, January 7, 1977.

Appellant's motion for bail pending appeal was granted. On appeal, appellant raised the Fourth Amendment issue and further asserted that Public Law 22 violated his

federal constitutional right to travel. (Appellant's Brief to the Puerto Rico Supreme Court at 7-8.)

On December 14, 1977, the Supreme Court of Puerto Rico issued its Judgment (Juris. St., App. B) and four separate opinions (Juris. St., App. A). Although a majority of the Justices who heard the case believed Public Law 22 to be unconstitutional (Juris. St., App. B) the judgment below was affirmed on the basis of Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico which provides:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices *of which the Court is composed* in accordance with this Constitution or with law. [Emphasis added.]

The Supreme Court of Puerto Rico is now composed of eight members. Mr. Justice Rigau did not participate in the decision and no reason was given for his failure to do so. (Juris. St., App. B.) Because only four of the seven justices voted to declare the statute unconstitutional, appellant's conviction was affirmed.

Although the majority was powerless to declare Public Law 22 unconstitutional, it did provide an authoritative construction of the statute. Writing for the majority, Mr. Justice Irizarry first noted that the law authorized "indiscriminate" searches. (Juris. St., App. A at 3.) He went on to determine that consistent with the stated "motives" of Public Law 22, the law was "directed at seeking 'firearms, explosives, narcotic substances, depressants or

stimulants or similar substances' . . . *with the purpose of instituting criminal prosecutions.* . . ." (Juris. St., App. A at 13; emphasis added.)

The majority rejected the lower court's interpretation that the statute was directed solely towards "objects" or luggage.

> The searches authorized by said statute do not have the exclusive purpose of seizing objects. The facts of this case demonstrate this. Appellant was stopped, accused, tried and convicted as a result of the search of his luggage conducted pursuant to said act. *The police power of the state is not synonymous to the power of the police to stop persons and search them without reasonable grounds. The latter is what Act No. 22 authorizes* against the clear constitutional provisions which forbid it.
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> (Juris. St., App. A at 30; emphasis added.)

The majority also held that the particular search herein was in fact "indiscriminate" and that there is "no controversy in that the detention and the search of appellant's belongings were carried out without reasonable grounds to believe that he was acting contrary to law." (Juris. St., App. A at 3.)

The majority then rejected the border search argument as inapplicable because Public Law 22 "deals with the entry of persons and articles from the United States" and under such circumstances, "our borders are state borders." (Juris. St., App. A at 5.) Mr. Justice Irizarry noted that "[s]tates have not been authorized to stop all those who trespass its borders and search them without reasonable grounds to do so." (Juris. St., App. A at 6.)

He rejected the view that Puerto Rico's island status makes it any different from the states for Fourth Amendment purposes, since most people travel to Puerto Rico by plane, and it is "irrelevant whether the surface flown over is land or sea. . . . When traveling by plane, there is no difference between going from here to Miami or from Miama [sic] to New York." (Juris. St., App. A at 21.)

The majority also rejected the argument that the compact between the United States and Puerto Rico gives it the right to "consider the United States as a foreign country. . . ."

> The special relationship between Puerto Rico and the United States, based on the existence of a compact —Public Law 600, 81st Cong., 1 L.P.R.A., Vol. 1, pp. 136-138—does not empower us to consider the United States as a foreign country and to subject all persons arriving at Puerto Rico from the United States to an indiscriminate search of their persons and their belongings, without a search warrant and without probable cause or reasonable grounds. The Commonwealth is not an associated republic. Far from that, it is a political condition adopted by us in Puerto Rico based on, among other fundamental principles, our union with the United States. . . .
>
> (Juris. St., App. A at 19-20.)

Three additional opinions were filed by Justices who concurred with the affirmance of the judgment, but who believed Public Law 22 to be constitutional.

Mr. Justice Diaz concluded that Public Law 22 is constitutional under the "border search" doctrine. (Juris. St., App. A at 39-50.) Mr. Justice Diaz argued that Puerto Rico is a "unique entity" (Juris. St., App. A at 44), which

is more vulnerable than the states to illegal smugglers. He would, therefore, create a *"de facto* border for 'domestic' travelers which requires as much surveillance as United States international borders." (Juris. St., App. A at 45.)

Finally, he argued that the majority should not lock itself in the "conceptual prison of *stare decisis*." (Juris. St., App. A at 55.)

Mr. Justice Martin also favored a "community standards" approach to the Fourth Amendment. (Juris. St., App. A at 63-67.) In his view "the protection against unreasonable searches should be safeguarded but not when it affects the community." (Juris. St., App. A at 63.)

Notwithstanding the fact that appellant was already off the aircraft, Mr. Justice Negron concluded that the search should be upheld as an "airport search." (Juris. St., App. A at 73-75.) He also argued that the search was valid as an administrative inspection. (Juris. St., App. A at 75-85.) Finally, he would grant to Puerto Rico "prerogative and powers that the federal constitution denies to the states of the Union." (Juris. St., App. A at 85.) Citing the special tax arrangement granted Puerto Rico, he argued that Puerto Rico is to be distinguished from the states because the states "cannot escape the application of federal laws because they are part of the supreme law of the nation." (Juris. St., App. A at 86.) This distinction, he argued, gives Puerto Rico "a power that is analogous to that of federal customs agents at the nation's borders." (Juris. St., App. A at 87.)

On December 21, 1977, appellant filed a timely Notice of Appeal (Juris. St., App. D at 119-20) and a request for a stay of mandate pending appeal to this Court. The

stay was granted on January 4, 1978.[2] On January 11, 1978, appellant filed an Amended Notice of Appeal in conformance with Rule 10 of the Rules of this Court. (Juris. St., App. E at 121-23.) Both notices of appeal raised the Fourth Amendment issues. They further argued that it was a denial of due process to uphold appellant's conviction against Fourth Amendment attack when a majority of the members of the Supreme Court of Puerto Rico who heard the case believed Public Law 22 to be unconstitutional.

In his Notice of Appeal and in a separate request dated January 12, 1978, appellant asked that the record before the Puerto Rico Supreme Court be translated and sent to this Court. On March 1, 1978, Mr. Justice William J. Brennan, Jr. extended the time to file the jurisdictional statement to and including May 13, 1978, because the record had not yet been translated. On April 5, 1978, the Clerk of the Supreme Court of Puerto Rico forwarded a copy of the translated record to counsel.

On April 14, 1978, appellant filed a motion for reconsideration in the Supreme Court of Puerto Rico. The motion alleged that an opera star had recently been searched pursuant to Public Law 22, that the search had generated much publicity and that a newspaper reported that Mr. Justice Rigau had stated that he is now prepared to vote on the constitutionality of Public Law 22. The motion asked that the Court allow Mr. Justice Rigau to vote and that it reconsider its interpretation of Article V § 4 of the Puerto Rico Constitution. On May 4, 1978, the

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[2] The translation of the Resolution dated January 4, 1978, incorrectly omitted the Court's order by translating the words "it is so granted" as "the Court provides as follows." Since the parties do not contest his status, appellant has not asked for a correction.

motion was denied. The motion is printed at Appendix A of the Motion to Dismiss or Affirm, at pages 1a-5a. The order denying the motion is printed at Appendix B of the Motion to Dismiss or Affirm at pages 6a-7a.

The Jurisdictional Statement was filed on May 12, 1978. Probable jurisdiction was noted on October 2, 1978.

Summary of Argument

The Fourth Amendment applies to actions by officers of Puerto Rico. The government and the courts below assumed that it applies, and both the Supreme Court of Puerto Rico, and the First Circuit have previously so held. *United States* v. *Villarin Gerena,* 553 F.2d 723, 724 (1st Cir. 1977); *People of Puerto Rico* v. *Caballero,* 100 P.R.R. 146 (1971). The Fourth Amendment applies to Puerto Rico on any one of four rationales:

1. It applies directly under *Reid* v. *Covert,* 354 U.S. 1 (1957), which held that all the Bill of Rights apply to territories and possessions of the United States, with the possible exception of places where the application would "disrupt long-established practices and be inexpedient." 354 U.S. at 13. Since the days of Spanish rule Puerto Rico has had a prohibition on unreasonable searches and seizures in one form or another. The Commonwealth compact contains an explicit prohibition on unreasonable searches and seizures as well as an exclusionary rule. Thus, one cannot say that application of the Fourth Amendment would disrupt long-established practices. Indeed, *not* to apply it would be inexpedient and disruptive.

2. Even if the Fourth Amendment does not apply to the Commonwealth directly under the *Reid* v. *Covert* rationale, it applies by virtue of the Compact between the United States and the people of Puerto Rico. The compact explicitly granted the protections of the federal Bill of Rights to residents of Puerto Rico. *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 594 n. 25 (1976). In entering the compact, Congress exercised its power under the Territorial Clause, Art. IV, § 3, cl. 2 to mandate that the Bill of Rights be extended in full force and effect to Puerto Rico in the same manner as to the states.

3. If the Court holds that as a constitutional matter Congress had no authority under the Territorial Clause to extend the Bill of Rights to Puerto Rico, nonetheless the Bill of Rights should apply in order to honor the contract between the people of Puerto Rico and the United States Congress. In entering into the compact with Congress, the people of Puerto Rico bargained for and got the protections of the Bill of Rights. Applying Fourth Amendment protections as a non-constitutional matter would have the same practical effect as applying those protections constitutionally.

4. Finally, the "rights, privileges and immunities" granted to citizens of Puerto Rico under the compact and under an explicit provision of the Federal Relations Act (61 Stat. 772, 48 U.S.C. § 737), may and should be expanded to include protections from unreasonable searches and seizures.

Public Law 22 authorizes blanket, warrantless searches of persons, luggage and effects arriving in Puerto Rico from the United States mainland. The searches are both indiscriminate, in that they apply to everyone and everything, and utterly discretionary, in that they require

neither probable cause nor any cause at all. As such, they clearly contravene the Fourth Amendment prohibition against unreasonable searches and seizures. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 273 (1973); *United States* v. *Chadwick,* 433 U.S. 1, 15 (1977).

The government and the prevailing minority below sought to justify Public Law 22 under the border search doctrine. They argue that because Puerto Rico has been subjected to increased traffic in illegal guns and drugs, it should be allowed to create an "intermediate" border between itself and the mainland United States. Such an argument ignores the clear intent of both Congress and Puerto Rico in setting up the Commonwealth. Puerto Rico is indisputably a part of the United States. It is included within the boundaries of the United States and is part of our customs territory. Congress has no more given Puerto Rico the right to search passengers arriving from the mainland than it has authorized New York to search those coming from New Jersey. Puerto Rico may not rely on an increase in illegal traffic—a problem it shares with nearly every region of the country—in order to justify a statute which violates the Fourth Amendment. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 273 (1973).

The challenged searches are neither made at the functional equivalent of a border nor otherwise exempt from warrant and probable cause requirements. The "fixed checkpoint" stops upheld by this Court in a wholly different context involved only brief detentions which did not include authority to search. "[C]heckpoint searches are reasonable only if justified by consent or probable cause to search." *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 567 (1967).

Public Law 22 violates not only the Fourth Amendment; it violates the constitutional right to travel as well. That right "has been firmly established and repeatedly recognized." *United States* v. *Guest,* 383 U.S. 745, 757 (1966).

This Court has recently assumed that the right to travel freely between Puerto Rico and any of the several states is "virtually unqualified." *Califano* v. *Torres,* —— U.S. ——, 55 L.Ed. 2d 65, 69 n. 6 (1978). The imposition of any penalty on the constitutional right to travel must be justified by a compelling state interest. *Dunn* v. *Blumstein,* 405 U.S. 330, 340 (1972). The interest which Puerto Rico asserts here is shared by nearly every state and major city in the nation. To allow it to be asserted in such a way would effectively eliminate the right to travel freely within the United States.

Despite a clear recognition of the constitutional infirmity of Public Law 22, the majority of the court which heard appellant's case was barred from overturning his conviction. This anomalous outcome resulted from the application of Article V, § 4 of the Puerto Rican Constitution. That section requires a majority of the eight-member Supreme Court to agree before a statute may be declared unconstitutional. Because only seven Justices sat to hear the appeal, the majority of four which voted to overturn the conviction was insufficient under Article V, § 4. Thus, the votes of five Justices are necessary to vindicate a federal right but the votes of only three are sufficient to extinguish it. Under the circumstances of this case, the application of Article V, § 4 subordinated federal rights to local law in violation of the Due Process and Supremacy Clauses of the United States Constitution.

ARGUMENT

I.

Public Law 22 has been interpreted to authorize indiscriminate, warrantless searches without probable cause.

Section 1 of Public Law 22, 25 L.P.R.A. § 1051, has three clauses:

First, the Police of Puerto Rico are:

> [E]mpowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States. . . .

Second, the Police are also empowered and authorized to:

> [E]xamine cargo brought into the country. . . .

Finally, they are authorized to:

> [D]etain, question, and search those persons whom the police have grounds to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

Public Law 22, August 6, 1975, 25 L.P.R.A. § 1051 (West, 1975, 658-59).[3]

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[3] Section 2 of the Act requires that "advertisements" of the foregoing provisions be "placed in a visible place on piers and airports by the Police of Puerto Rico for all landing passengers." 25 L.P.R.A. § 1052. Section 3 requires that Police acting pursuant to the Act be in uniform, show credentials and conduct the search "in a respectful way, and as brief as possible." Appellant does not contest that the search was conducted in a respectful way. Its brevity or lack thereof is not in issue. Section 3 also provides that "[m]anual search of persons shall be carried out by individuals of the same sex as the person involved, and in appropriate places guaranteeing the greatest privacy." 25 L.P.R.A. § 1953. The record similarly does not reflect compliance or lack thereof with this section, and it is not in issue.

The meaning of the first section appears to be clear. It is authorization—although not an express command—for the police to inspect all the luggage, packages, bundles and bags of persons arriving in Puerto Rico from the mainland.[4] The Act provides no standards for initiating inspections. Under the language of the Act, baggage inspections may be conducted for any reason or for no reason at all.

The second clause of Section 1 is similarly sweeping. It gives the Police power to examine any cargo brought into the "country." It is also far less precise than the first clause. "Country" may mean Puerto Rico or the United States. In any event, the second clause broadens the unrestricted search authority to include all goods, whether accompanied by private individuals or shipped separately.

On its face, the third clause would appear to authorize the stop and search of any person, any time, anywhere, whom "the Police have ground to suspect" of illegally carrying firearms, narcotics and the like. There is no geographical limit, and, as in the first two clauses, neither

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[4] The use of the phrase "from the United States" implies that Puerto Rico is not in the United States. The general language in the Statement of Motives to the Act and the incontestable status of Puerto Rico as being part of the United States suggests that the Legislature meant "mainland" United States. It was so assumed below. *See*, Statement of Motives to Public Law 22, 25 L.P.R.A. §§ 1051-1054 (West 1975), App. at 4a-5a. *See, e.g.*, Opinion of Mr. Justice Irizarry (Juris. St., App. A at 21); Opinion of Mr. Justice Negron Garcia (Juris. St., App. A at 71).

a warrant nor probable cause is required. The Supreme Court of Puerto Rico, however, has put a limiting interpretation on the final clause by assuming that it, like the other clauses, applies only to persons arriving from the United States mainland. (Juris. St., App. A at 22.) The majority expressly interprets the statute as not requiring "reasonable ground to suspect" before the Police may search bundles and bags. Thus, in order to conduct a luggage search, the Police may stop a person for any reason or none at all.[5] The majority also held that the searches are conducted "with the purpose of instituting criminal prosecutions. . . ." (Juris. St., App. A at 13.) Mr. Justice Diaz appears to differ from the majority only in his belief that the Act does require reasonable grounds to search an individual, but not for search of his or her luggage. Mr. Justice Martin also would read the statute to require "reasonable grounds" for search of the person, but no reason at all for search of luggage or cargo. (Juris. St., App. A at 60.) Although Mr. Justice Negron's position on this issue is somewhat less clear, he too appears to be of the view that the search of a person—but not the person's luggage—requires "reasonable grounds."[6] (Juris. St., App. A at 70-71, n. 1.)

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[5] "The second half of section 1 of Act No. 22 (1975) provides that 'in order to detain, question, and search persons' arriving from the United States, the Police must have grounds 'to suspect [they illegally carry] firearms, explosives, depressants or stimulants or similar substances.' Nevertheless, the first half of said section 1 empowers and authorizes the Police of Puerto Rico 'to inspect the luggage, packages, bundles, and bags' of said persons without requiring reasonable grounds. In other words, it authorizes the Police to search the baggage, packages, bundles and bags of passengers indiscriminately."

Majority opinion of Mr. Justice Irizarry (Juris. St., App. A at 22) (brackets in the original).

[6] The statute speaks only of "ground to suspect" (*motivos fundados*) and not probable cause (*causa probable*).

The differing interpretations of the majority and minority may be summarized as follows: The majority believes the statute to authorize the Police to search—for any reason or no reason at all—the person, luggage, packages, bundles, and bags of anyone entering Puerto Rico from the United States mainland, as well as any cargo he or she may send separately. The minority believes the statute to authorize the police to search luggage, packages, bundles, bags and cargo for any reason or no reason at all, but believes that it requires "reasonable grounds" for the search of the particular person.

In the present circumstances involving a search of appellant's luggage without reasonable grounds, both the minority and the majority recognize that the statute purports to authorize a warrantless search, solely at the officer's discretion, with neither probable cause nor any lesser reasonable suspicion as a predicate for the search. Since, as we demonstrate below, such a statute is far beyond the constitutional pale under either interpretation, the distinction is of no major importance. This Court is bound by the Puerto Rico Supreme Court's interpretation of the meaning of the statute since the interpretation is fully consistent with the statute and certainly not "inescapably wrong." *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 43 (1970) (*per curiam*).[7]

Under Public Law 22 Agent Marcano had complete discretion to search appellant's luggage if he so chose.

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[7] The "inescapably wrong" language cited in *Fornaris* was taken from Mr. Justice Douglas' opinion in *Bonet* v. *Texas*, 308 U.S. 463, 471 (1940). *Bonet*, of course, was decided before the creation of the Commonwealth. If, as we suggest below, Puerto Rico is to be treated as a state for purposes of the application of Fourth Amendment protections, it may be that the standard of deference should be even higher. A state court's interpretation of a local statute is final and not subject to review even if "inescapably wrong." *See, Murdock* v. *City of Memphis*, 20 Wall. 590 (1875).

The government and each of the judges below agree that appellant was stopped without "reasonable grounds" to believe he was violating the law.[8] Opinion of Mr. Justice Irizarry (Juris. St., App. A at 22-23); Opinion of Mr. Justice Diaz (Juris. St., App. A at 31); Opinion of Mr. Justice Negron Garcia (Juris. St., App. A at 87); Opinion of Mr. Justice Martin (Juris. St., App. A at 60).

Similarly, there is no dispute as to what prompted the stop. The trial judge found that appellant "seemed somewhat nervous, followed with his eyes the movements of [the] agent." (Juris. St., App. C at 103.) The judge also adopted the agent's testimony that he intervened "partly due to the defendant's [nervous] conduct and to the way he was dressed, but was rather based on the authority granted by Act No. 22 of August 1975, and that the defendant was not a suspect." *Id.* at 106. This is a long way of saying that the agent had no real reason for stopping appellant.

Finally, it is undisputed that a warrant was neither sought nor issued.

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[8] In determining whether there was probable cause to search, this Court is not bound by conclusions of lower courts that a set of facts constitutes probable cause. *Ker* v. *California*, 374 U.S. 23, 34 (1963). Nor, we suppose, is it bound by concessions below. *See, Swift & Company* v. *Hocking Valley Railway Company*, 243 U.S. 282, 289 (1917). Here, however, there can be no question that the majority's characterization of the search as "indiscriminate" and "without reasonable grounds" is accurate. *See,* Juris. St., App. A at 22-23.

II.

The Fourth Amendment to the United States Constitution applies to actions of Police of the Commonwealth of Puerto Rico.

Both the government and the courts below have assumed that the Fourth Amendment applies to actions of officers of the Commonwealth of Puerto Rico.[9] The First Circuit has also concluded that the Fourth Amendment applies. *United States* v. *Villarin Gerena*, 553 F.2d 723, 724 (1st Cir. 1977).[10] They are all, of course, entirely correct. Because the applicability of the Fourth Amendment is intimately related to the status of Puerto Rico and thereby to the heart of the government's argument, however, we review here the development of Fourth Amendment principles in Puerto Rico.

Mr. Justice Blackmun recently discussed the applicability of the Bill of Rights to Puerto Rico in *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 586-94 (1976). His discussion reflected a longstanding concern over Congressional intent with respect to the island. Thus, the *Otero* Court concluded that the Foraker Act, 31 Stat. 77, April 12, 1900, the first comprehensive legislation concerning Puerto Rico,

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[9] *See, e.g.*, Report of the Solicitor General to the Puerto Rican Supreme Court at 6 ("The Fourth Amendment to the Constitution of the United States and Article II, Section 10 of the Constitution of the Commonwealth of Puerto Rico provide that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); *see, also,* Opinion of Mr. Justice Irizarry for the majority, Juris. St., App. A at 3.

[10] "Like the Supreme Court, we have no need to decide whether the Fourth Amendment's protection against unreasonable arrest and the Fifth Amendment due process clause apply directly or are funneled through the Fourteenth Amendment." 553 F.2d at 724.

indicated Congressional uncertainty over the extent to which the Constitution applied. The Court also noted an apparent desire on the part of Congress to leave "the question of the personal rights to be accorded to the inhabitants of Puerto Rico to orderly development by this Court and to whatever further provision Congress itself might make for them." 426 U.S. at 590.

In the Organic Act of 1917, 39 Stat. 951 (the Jones Act), Congress codified a bill of rights which provided Puerto Ricans with "nearly all the personal guarantees found in the United States Constitution." 426 U.S. at 591,[11] including protection against unreasonable searches and seizures. The first provision of the bill of rights in the Jones Act was essentially similar to that in the first clause of the Fourteenth Amendment. This Court therefore concluded in *Otero* that Congress must have chosen that language "with the Fourteenth Amendment in mind and with a view to further development by this Court of the doctrines embodied in it." 426 U.S. at 591-92.

In Public Law 600, the Act of July 3, 1950, 64 Stat. 319, Congress took the first step toward creating the Commonwealth of Puerto Rico. The Act authorized Puerto Rico to draft a constitution which was to "provide a republican form of government" and "include a bill of rights." 48 U.S.C. § 731c, 64 Stat. 319. That constitution was approved by Congress with the proviso that any amendment or revision must be consistent with "the applicable provisions of the Constitution of the United States." 66 Stat. 327, 48 U.S.C. § 731d. The Senate report approving the constitution explained that the purpose of this condition was that "[a]pplicable provisions of the United States Constitution and the Federal Relations Act [64 Stat. 319] will have the

[11] At the same time, Congress granted Puerto Rican citizens United States citizenship. Jones Act § 5, 39 Stat. 953.

same effect as the Constitution of the United States has with respect to State constitutions or State laws"; and went on to state:

> Any act of the Puerto Rican Legislature in conflict with . . . the Constitution of the United States or United States laws not locally inapplicable would be null and void.
>
> Within this framework, the people of Puerto Rico will exercise self-government. As regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union.

S. Rep. No. 1720, *Approving the Constitution of the Commonwealth of Puerto Rico,* 82d Cong., 2d Sess. at 6 (1952). *See, Examining Board* v. *Flores de Otero,* 426 U.S. 572, 593 n. 25 (1976).

Congress' view that local acts "in conflict with . . . the Constitution . . . would be null and void" was shared by the people of Puerto Rico. The Resident Commissioner, Puerto Rico's elected representative to Congress, testified:

> Under S. 3336, the local governmental structure of Puerto Rico would be predicated on the democratic principle; not only would the people be authorized, as it is now, to adopt its local laws, but also on the local law of laws, the local constitution; while its station within the United States Federal system, as heretofore determined by Congress, would remain unimpaired. The local constitution would, of course, be comparable with a State constitution.[12]

[12] Statement of Dr. Antonio Fernos-Isern, Resident Commissioner of Puerto Rico, United States Senate Hearing before the Subcommittee of the Committee on Interior and Insular Affairs, May 17,

The Governor of Puerto Rico put it succinctly:

> Naturally, the Constitution of Puerto Rico, like those of the States, cannot diminish any rights guaranteed by the Federal Constitution in its application to Puerto Rico.[12]

In our view, the Fourth Amendment applies to and limits actions of the police of Puerto Rico on one of four alternative theories. Regardless of the rationale by which the protections of the Fourth Amendment are applied to Puerto Rico, the practical effect is the same. Evidence unlawfully obtained must be suppressed. *Compare Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) *with* Constitution of the Commonwealth of Puerto Rico, Article II, § 10, cl. 4.

1. *The Fourth Amendment applies directly to Puerto Rico.*

Regardless of Congressional intent, the decisions of this Court make it apparent that the Bill of Rights—and certainly the Fourth Amendment—applies to the Commonwealth of Puerto Rico.

It was not always so. Beginning with *Ross* v. *McIntyre*, 140 U.S. 453 (1891) and continuing with the so-called "Insular Cases,"[13] this Court first limited the extent to which

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1950 at 3. *See, also*, Statement of Hon. Cecil Snyder, Associate Justice of the Supreme Court of Puerto Rico, *id.* at 23, 24; Statement of Hon. Luis Munoz-Marin, Governor of Puerto Rico, House of Representatives Hearings before the Committee on Public Lands, July 12, 1949, at 4 and 26.

[12] Statement of Hon. Luis Munoz-Marin, Governor of Puerto Rico, United States Senate Hearings Approving the Puerto Rican Constitution before the Committee on Interior and Insular Affairs, April 29, 1952, at 15.

[13] *See, Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); *Dorr* v. *United States*, 195 U.S. 138 (1904). Prior to the Insular Cases, the Court had taken the position that all the restraints of the Bill of Rights applied to all territories. *See, e.g., Thompson* v. *Utah*, 170 U.S. 343, 349 (1898).

the Bill of Rights followed Americans abroad and in United States territories. In allowing the trial of an American seaman before an American consul in Japan, *Ross* held that the Constitution had no applicability abroad. 140 U.S. at 464. In the Insular Cases, the Court distinguished between so-called "incorporated" territories bound for statehood and "unincorporated" territories. Incorporated territories were subject to all the provisions of the Bill of Rights, whereas unincorporated territories were accorded only limited rights because of a fear that their different cultures and customs would be disturbed. *Balzac* v. *Porto Rico*, 258 U.S. 298, 310 (1922).

In *Reid* v. *Covert*, 354 U.S. 1 (1957), however, this Court disapproved *Ross* v. *McIntyre* and sharply limited the Insular Cases to their historical facts. 354 U.S. at 12, 14. Holding that dependents of servicemen abroad were entitled to the full protection of the Bill of Rights, the Court specifically disapproved the suggestion in *Dorr* v. *United States*, 195 U.S. 138, 144-48 (1904), that only "fundamental" constitutional rights protect Americans in the territories or abroad. It found:

> . . . no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shall nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.

Reid v. *Covert*, 354 U.S. 1, 9 (1957) (plurality opinion).[14]

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[14] Mr. Justice Black's plurality opinion was joined by the Chief Justice and by Justices Douglas and Brennan. Justices Frankfurter and Harlan concurred, but would limit the holding to capital cases. 354 U.S. 41, 64, 65, 77-78. *Covert* and its progeny —*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960);

The teaching of these cases is twofold. First, the Bill of Rights applies with full force and effect to actions by *federal* officers anywhere in the world. Had appellant been searched by a federal officer, he would have come squarely within the holding of *Reid* v. *Covert*, 354 U.S. 1 (1957). Second, the Bill of Rights protects persons from actions of local officers within all the territories and possessions of the United States, with the possible and only exception of those territories whose cultures are so alien that application of the Bill of Rights would "disrupt long-established practices and would be inexpedient." *Reid* v. *Covert*, 354 U.S. 1, 13 (1957), *see*, *King* v. *Morton*, 520 F.2d 1140, 1147 (D.C.Cir. 1975); *King* v. *Andrus*, 452 F.Supp. 11 (D.D.C. 1977). The rationale is grounded in common sense and a decent respect for the inhabitants of the territories. If the United States is to impose its laws on the inhabitants of a territory—whether directly or through a territorial or other government approved by Congress—then, at a minimum, the residents of the territory are entitled to the protections of the Bill of Rights.

We recognize that *Reid* v. *Covert*, *supra*, involved action by federal officials. Its importance here, however, is in its repudiation of the doctrine of the Insular Cases limiting the applicability of the Bill of Rights to territories and possessions. Once it is recognized that the Bill of Rights applies to searches by federal officers in Puerto Rico,[16] no

Grisham v. *Hagen*, 361 U.S. 278 (1960); *McElroy* v. *United States ex rel. Dominic Guagliardo*, 361 U.S. 281, 288 (1960)—were the result of direct action by a United States agency abroad.

[16] The First Circuit has long recognized the applicability of the Fourth Amendment to federal officers acting in Puerto Rico. *See, e.g.*, *United States* v. *Union Nacional de Trabajadores*, 576 F.2d 388 (1st Cir. 1978); *Montilla Records of Puerto Rico, Inc.* v. *Morales*, 575 F.2d 324 (1st Cir. 1978); *United States* v. *Cruz Pagan*, 537 F.2d 554 (1st Cir. 1976); *United States* v. *Mark Polus*, 516 F.2d 1290 (1st Cir. 1975), *cert. den.* 423 U.S. 895 (1976).

basis exists for a "double standard" for local and federal officials. *Mapp* v. *Ohio*, 367 U.S. 643, 658 (1961). Indeed, such a double standard would only sink the Court back into the quicksand of the "silver platter" doctrine discarded in *Elkins* v. *United States*, 364 U.S. 206, 223 (1960), but not without leaving a legacy of needless conflict between state and federal officers. *See*, *Rea* v. *United States*, 350 U.S. 214 (1956).

During the period in which it adhered to the "fundamental right" analysis of the Insular Cases, *Dorr* v. *United States*, 195 U.S. 138 (1904), this Court held only two of the provisions of the Bill of Rights inapplicable to Puerto Rico. In *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922), the Court declined to apply the right to trial by jury and the right to indictment by grand jury. At that time, of course, neither the right to trial by jury nor the right to indictment by grand jury applied to the States. *See*, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Hurtado* v. *California*, 110 U.S. 516 (1884). In short, this Court has never denied to the residents of a territory or possession any of the Bill of Rights while holding them applicable to the States. The theory on which those rights have been held to apply has differed, but the result has been essentially the same.

There would appear to be little difference between a right which is "fundamental" (*Dorr* v. *United States*, 195 U.S. 138 (1904)) and one which is "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). *See*, *Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). The modern standard enunciated in *Reid* v. *Covert* appears to facilitate application of constitutional rights more than either of the two earlier standards."

[17] Even if the "fundamental rights" approach of *Dorr* v. *United States*, 195 U.S. 138 (1904), were still good law, the Fourth Amendment would apply since it is a "fundamental right." *Wolf* v. *Colorado*, 338 U.S. 25, 27-28 (1949).

Under the teaching of *Covert*, *all* the provisions of the Bill of Rights apply to Puerto Rico directly unless their application would—in light of the island's history—"disrupt long-established practices and would be inexpedient." 354 U.S. 1, 13 (1957). The Fourth Amendment, however, is hardly a stranger to Puerto Rico. Indeed, the Fourth Amendment's prohibition of unreasonable searches and seizures has been a part of the culture of Puerto Rico since at least the Spanish Constitution of 1876. Article 8 of that constitution provided:

> Every warrant for imprisonment, for the search of a domicile, or for the detention of correspondence must state cause for its issuance.[18]

The Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897 continued the rights granted Puerto Ricans under the Spanish Constitution. The Governor-General, however, was authorized to suspend, among other provisions, Article 6 of the Spanish Constitution, which provided that no person could enter the house of a Spaniard or foreign resident in Spain without his consent.[19]

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[18] The Spanish Constitution of 1876, as well as other relevant historical documents, is reprinted in *Documents on the Constitutional History of Puerto Rico*, Office of the Commonwealth of Puerto Rico (2d ed., June 1964) (hereinafter "*Documents*"). The Spanish Constitution appears at 9-21.

[19] Article 6 of the Spanish Constitution (*Documents* at 10) provided:

> Art. 6. No person may enter the house of a Spaniard or foreigner resident in Spain without his consent, except in the cases and in the manner expressly provided in the laws.
>
> The examination of papers and effects shall always be carried on in the presence of the interested party, or of a member of his family, and in default thereof, in the presence of two neighboring witnesses from the same town.

Article 42, subparagraph 4, of the Constitution Establishing Self-Government in the Island of Puerto Rico in 1897 (*Documents* at 40) granted the Governor-General authority to suspend that provision.

The Foraker Act, the First Organic Act of Puerto Rico, March 1, 1900, 31 Stat. 77, contained no specific provision respecting property or search and seizure.[20] The Jones Act, the Organic Act of 1917, 39 Stat. 951, however, provided:

> That the right to be secure against unreasonable searches and seizures shall not be violated.
>
> That no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

39 Stat. 951, § 2.

The current constitution of Puerto Rico contains the most explicit protection from unreasonable search and seizure, including a constitutionally required exclusionary rule:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
>
> Wire-tapping is prohibited.
>
> No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.
>
> Evidence obtained in violation of this section shall be inadmissible in the courts.

Article II, Section 10, of the Constitution of the Commonwealth of Puerto Rico (48 U.S.C. § 731d).

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[20] It did, however, set up a procedure for appeal to the United States Supreme Court for claimed violations of federal constitutional rights. Foraker Act § 35, 31 Stat. 85, § 35.

Whatever the history and culture of Puerto Rico may suggest with respect to the rest of the Bill of Rights, there can be no doubt that the Fourth Amendment guarantee against unreasonable search and seizure is, and long has been, fully a part of the Puerto Rican culture and tradition.[21] Indeed, it would "disrupt long-established practices" if the Fourth Amendment were not applied.

2. *The Fourth Amendment applies to Puerto Rico by operation of the Territorial Clause of the United States Constitution.*

Although appellant's position is that the Fourth Amendment applies directly to Puerto Rico under the *Covert* rationale, we recognize, as did the Court in *Examining Board* v. *Flores de Otero,* that the relationship between the United States and Puerto Rico "has no parallel in our history. . . ." 426 U.S. at 596. We realize, therefore, that the Court may decide not to apply the Bill of Rights to Puerto Rico under the *Covert* rationale. Even if the Court reaches that conclusion, however, it can and should honor Congress' intent to apply the Bill of Rights by exercising its power under the Territorial Clause. That clause provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[21] The courts below and the government have assumed its applicability. *See,* citations, *supra,* footnote 9. The Puerto Rico Supreme Court has so assumed in its prior cases, *see, e.g., People of Puerto Rico* v. *Caballero,* 100 P.R.R. 146 (1971), as has the First Circuit Court of Appeals, *see, e.g., United States* v. *Villarin Gerena,* 553 F.2d 723, 724 (1st Cir. 1977); *Amezquita* v. *Hernandez-Colon,* 518 F.2d 8 (1st Cir. 1975), *cert. den.* 424 U.S. 916 (1975).

Article IV of the Constitution of the United States, § 3, cl. 2. The powers vested in Congress by the Territorial Clause are "broad." *Examining Board* v. *Flores de Otero,* 426 U.S. 586 n. 16 (1976).

The Court has recognized the intent of Congress in the 1950 and 1952 legislation "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. . . ." 426 U.S. at 594. Most important, of course, is Congress' intent that "[a]ny act of the Puerto Rican Legislature in conflict with . . . the Constitution of the United States . . . would be null and void." 426 U.S. at 593 n. 25, quoting S. Rep. No. 1720 at 6.

If this Court were to give full effect to Congressional intent in the matter, then it would apply the Fourth Amendment to Puerto Rico, as it has applied it to the States. *Wolf* v. *Colorado,* 388 U.S. 25 (1949); *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

The ultimate resolution of questions respecting the applicability of the Constitution to Puerto Rico is, of course, for this Court. *Marbury* v. *Madison,* 1 Cranch 137 (1803).[22] Nevertheless, the Court has expressed considerable concern that the intent of Congress be realized. 426 U.S. at 590.

[22] Mr. Dooley put it somewhat less elegantly than Chief Justice Marshall:

> It happened a long time ago an' I don't raymimber clearly how it came up, but some fellow said that ivrywhere th' Constitution wint, th' flag was sure to go. "I don't believe wan wurrud iv it," says th' other fellow. "Ye can't make me think th' Constitution is goin' thrapezin' around ivrywhere a young liftnant in th' ar-rmy takes it into his head to stick a flag pole. It's too old. It's a home-stayin' Constitution with a blue coat with brass buttons onto it, an' it walks with a goold-headed cane. It's old an' it's feeble an' it prefers to set on th' front stoop an' amuse th' childher." . . . "But," says th' other, "if

It is not at all clear, however, that Congress at the time of the Compact had the power to decide whether and to what extent the Bill of Rights should apply to Puerto Rico. It could not, we assume, have decided that *none* of the provisions of the Bill of Rights apply to United States citizens resident in and traveling through Puerto Rico since "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n. 5 (1974), *quoting from Mora* v. *Mejias*, 206 F.2d 377, 382 (1st Cir. 1953).

It is not necessary for the Court to decide whether Congress could limit the applicability of the Bill of Rights. It is enough to recognize that the Territorial Clause is a sufficient grant of authority to Congress to permit it to expand application of the Bill of Rights beyond that which this Court might otherwise provide.

3. *The Compact between Congress and the people of Puerto Rico should be honored and the Fourth Amendment applied to Puerto Rico in the same manner as to the States.*

If this Court is of the view that its role as the final arbiter of the Constitution precludes Congressional extension of the Bill of Rights through the Territorial

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it wants to thravel, why not lave it?" "But it don't want to." "I say it does." "How'll we find out?" "We'll ask th' Supreme Court. They'll now what's good f'r it."

P. F. Dunne, *Mr. Dooley at His Best* (1938), quoted in Note, *Inventive Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 Va. L. Rev. 1041, 1063 n. 112 (1974).

Clause, it should nonetheless honor the Commonwealth Compact on non-constitutional grounds.

Under either the *Covert* or the Territorial Clause rationale, the Fourth Amendment would apply as a constitutional matter. If those rationales are not accepted, the Compact should still be honored and the protections of the Fourth Amendment applied to the people of Puerto Rico as they contracted for them. *See, Mora* v. *Torres*, 113 F.Supp. 309 (D.P.R.), *aff'd*, 206 F.2d 377 (1st Cir. 1953).

The legislative history of the Compact discussed above demonstrates that the representatives of the people of Puerto Rico assumed that they were protected by the Bill of Rights. Indeed, it is inconceivable that the people of Puerto Rico would have agreed to remain subject to the authority of Congress, even if somewhat limited, without the concomitant protections of the Bill of Rights.

The strongest evidence that the Fourth Amendment applies is found in the words of the Compact itself. Both the Puerto Rican Constitution and the Federal Relations Act require public officials in Puerto Rico to take an oath to support the Constitution of the United States. Constitution of the Commonwealth of Puerto Rico, Art. VI, § 16 (48 U.S.C. § 731d); Puerto Rican Federal Relations Act, 47 Stat. 158, 48 U.S.C. § 874. This requirement is not limited to "applicable provisions," and it in no way suggests that Puerto Rican officials such as the police are sworn to uphold some, but not all, of the provisions of the Bill of Rights.

To hold that the Fourth Amendment does not apply to actions by Puerto Rico's officials would have this Court needlessly disturb the balance bargained for and achieved by the parties to the unique Commonwealth Compact.

4. *The right to be free from unreasonable searches and seizures is one of the privileges and immunities of United States citizenship.*

As specifically provided in the Compact, the Privileges and Immunities Clause of article IV, § 2, cl. 1,[23] provides an alternative ground for applying Fourth Amendment protections to Puerto Rico.

Although the Puerto Rican Constitution supersedes the Bill of Rights originally contained in the Jones Act, the last clause of that Act remains in full force and effect:

> The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States.

61 Stat. 722, 48 U.S.C. § 737 (Aug. 5, 1947).

It is difficult to imagine a context in which the privileges and immunities of United States citizenship are more important than that involving Puerto Rico. The Preamble to the Puerto Rican Constitution states:

> We consider as determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage

[23] There are two Privileges and Immunities Clauses in the Federal Constitution. Article IV, § 2, reads as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The provision found in section 1 of the Fourteenth Amendment is more specific:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

> in the individual and collective enjoyment of its rights and privileges . . . .

The phrase "privileges and immunities," when used to refer to Puerto Rico, uniformly contains the added word "rights," suggesting that much more is involved here than the list of privileges traditionally found in Article IV, § 2.

That list has not changed substantially since it was first enunciated in *Corfield* v. *Coryell,* 6 F. Cas. 546 (No. 3230) (CCED Pa. 1825), a case this Court has described as "the first, and long the leading explication of the [Privileges and Immunities] Clause," *Austin* v. *New Hampshire,* 420 U.S. 656, 661 (1975). The list includes the following:

> the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal.
>
> 6 F. Cas. at 552.

The list was expanded in *Twining* v. *New Jersey,* 211 U.S. 78 (1908) with the addition of the right to petition Congress, to vote for national office, to enter the public lands, to be protected against violence while in the lawful custody of a United States marshal, and to inform the United States authorities of a violation of its laws. Mr. Justice Brennan, dissenting in *Baldwin* v. *Montana Fish and Game Comm'n,* —— U.S. ——, 56 L.Ed. 2d 354, 376 (1978) noted that *Doe* v. *Bolton,* 410 U.S. 179 (1973) added medical services to the rights protected by the Clause. *See generally, Hicklin* v. *Orbeck,* —— U.S. ——, 57 L.Ed. 2d 397 (1978).

In *Baldwin, supra,* this Court recently indicated that the privileges and immunities clause protects "fundamental"

interests, "interference with which would frustrate the purposes of the formation of the Union." —— U.S. ——, 56 L.Ed. 2d at 368. Surely the right to be free of indiscriminate, warrantless searches must be included within those interests.

Puerto Rico occupies a unique political status in our federal system. In compacting with the United States, the people of Puerto Rico were surely aware that they were embarking on a new and uncharted course. They clearly relied, therefore, on the fact of their United States citizenship to ensure them a steady and inviolable position within the Federation. Similarly, Congress had a strong interest in securing continuing rights to citizens of the mainland who travel or reside in Puerto Rico. These rights will be insignificant indeed if they are held not to include the right to be free of the searches sanctioned by Public Law 22.

Justice Jackson's discussion of the Privileges and Immunities Clause in *Edwards* v. *California* is instructive:

> This clause was adopted to make United States citizenship the dominant and paramount allegiance among us. The return which the law had long associated with allegiance was protection. The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: "Take heed what thou doest; for this man is a Roman."

314 U.S. 160, 182 (1941) (*dissenting opinion*).

The Fourth Amendment too has long been considered a "shield against oppression," and it should be included within the rights, privileges and immunities of citizens who are within the Commonwealth of Puerto Rico.

III.

Public Law 22 and the search made pursuant to that law violate the Fourth Amendment to the United States Constitution.

When he stopped Terry Torres, Officer Marcano did not have a search warrant.[24] He did not have probable cause either to arrest or to search Terry Torres.[25] And he had no reasonable ground to believe that Terry Torres had committed a crime or was carrying contraband.[26] He had, at most, a "hunch." *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968). Put simply, Terry Torres' liberty was in the hands of a "petty officer"[27] on August 6th, 1976. More importantly, it was not just that Puerto Rico placed the liberty of Terry Torres in the hands of officer Marcano, but, rather, that it placed the privacy, the dignity and the liberty of 1,642,052 persons in the hands of any officer of the Puerto Rican Police who chose to invade that privacy, violate that dignity and strip them of that liberty.[28]

This Court has seen more offensive individual violations of Fourth Amendment rights, but we doubt that it has considered a statute so sweeping in its scope and so lack-

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[24] Opinion of Mr. Justice Diaz Cruz. Juris. St., App. A at 31.

[25] Superior Court of Puerto Rico, San Juan Part, Resolution and Order. Juris. St., App. C at 108-09.

[26] Opinion of Mr. Justice Irizarry for the majority [hereinafter "Majority Opinion"]. Juris. St., App. A at 3.

[27] *See* James Otis' argument against the writs of assistance, reported in Adams, *Legal Papers of John Adams* 107 (1965).

[28] In the year 1976-77, 1,642,052 persons arrived at the San Juan Airport from the United States mainland. Commonwealth of Puerto Rico Tourism Company, *The Tourism Industry of Puerto Rico, Selected Statistics* 3 (1977).

ing in control over those who would implement it. It is only through the chance application of an unusual local procedural rule that the statute even survives to reach this Court.

The government concedes that there is no "international border" between Puerto Rico and the United States mainland. It claims, however, that there is an "intermediate" border between the mainland and Puerto Rico,[30] and that, if this Court will free Puerto Rico from "the conceptual prison of *stare decisis*,"[30] it can and should be authorized to conduct indiscriminate,[31] warrantless searches at that "border." The problem with the border search argument is threefold. First, there is no border, nor does Puerto Rico have the authority unilaterally to declare one. Second, even if there were such a border, the searches authorized by Public Law 22 are so subject to the whim of the officer that they cannot be justified even under an "intermediate border search" exception to the warrant requirement. Third, to the extent the government makes the additional claim that special crime problems justify a "border" search, the argument is wrong on the law and without foundation in the facts.

A. Public Law 22 Bears a Chilling Resemblance to the General Warrants and Writs of Assistance Which Gave Rise to the Fourth Amendment.

Public Law 22 bears a remarkable resemblance to the general warrants in England and the "hated writs of assistance" in its colonies. *Stanford* v. *Texas*, 379 U.S. 476,

[30] Motion to Dismiss or Affirm at 24.

[30] Opinion of Mr. Justice Diaz Cruz, quoted in Motion to Dismiss or Affirm at 38.

[31] Majority Opinion, Juris. St., App. A at 22.

481 (1965); *see*, *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 n.22 (1961). The general warrants and the colonial writs of assistance were characterized by an indefinite authorization to search and seize:

> In Tudor England officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent. . . .

Stanford v. *Texas*, 379 U.S. 476, 482 (1965).

The writs of assistance in the colonies were "permanent search warrants placed in the hands of customs officials; they might be used with unlimited discretion and were valid for the duration of the life of the sovereign." J. Landynski, *Search and Seizure and the Supreme Court* 19 (Johns Hopkins University Studies in Historical and Political Science, ser. 84, No. 1, 1966) (hereinafter "Landynski"). The vice of the warrants and writs, their "truly offensive character,"[32] stemmed from two related and intolerable defects.

First, they were indiscriminate. They licensed the officer to seize Everyman, without particularized cause. *See*, *Wilkes* v. *Wood*, 19 Howell St. Tr. 1152, 1167 (1763). Just as Wilkes decried Lord Halifax' warrant for the authors and publishers of No. 45 of the North Briton as "a ridiculous warrant against the whole English nation," 2 T. May, *The Constitutional History of England* 245-52 (3d ed. 1889), Public Law 22 is a general warrant against the some 1,600,000 persons who arrive at the airport in San Juan from the mainland each year.

The second and closely related vice of the warrants was that they placed an impermissible degree of discretion in

[32] *Berger* v. *New York*, 388 U.S. 41, 58 (1967).

the hands of the officer. History has bitterly condemned that "discretionary power . . . to search wherever their suspicions may chance to fall." *Wilkes* v. *Wood*, 19 Howell St. Tr. 1153, 1167 (1763) (Chief Justice Pratt—later Lord Camden—summing up to the jury). In Otis' famous phrase it was intolerable to allow "a power that places the liberty of every man in the hands of every petty officer." (Otis' argument against the writs of assistance as reported in Adams, *Legal Papers of John Adams* 107 (1965)). The cure for this unfettered discretion was the neutral magistrate. In Lord Mansfield's words:

> It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.

Lord Mansfield's summation in *Leach* v. *Three of the King's Messengers*, 19 Howell St. Tr. 1001, 1027 (1765), *quoted in United States* v. *United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 316 (1972).

The effort to remove discretion from the officer in the field led to the requirement that officers secure warrants and that these warrants describe the things to be seized with *particularity*.

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. *United States*, 275 U.S. 192, 196 (1927). *Accord*: *Berger* v. *New York*, 388 U.S. 41, 58 (1967); *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965).

The Fourth Amendment dealt with the twin problems of indiscriminate and discretionary searches by requiring specific warrants, issued upon probable cause, and particularly describing the person or things to be seized. The requirement is the same whether it is Agent Marcano seeking marihuana or the President of the United States dealing with "subtle and complex" matters of internal security. *United States* v. *United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 320 (1972).

The prohibition on warrantless searches is subject to but a few "jealously and carefully drawn" exceptions. *Jones* v. *United States*, 357 U.S. 493, 499 (1958). Those exceptions fall into three general categories: certain searches conducted where speed is essential and obtaining a warrant is impracticable, consent searches, and a very limited class of routine searches, which includes the border search. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 358-60 (1974). *Cf.*, *Carroll* v. *United States*, 267 U.S. 132, 153 (1925) (exigent circumstances); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (consent); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (routine search). Unless they fall into one of these categories, warrantless searches, not incident to a lawful arrest, are *per se* unreasonable, in violation of the Fourth Amendment. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971).

Indeed, a search *with* probable cause *and* incident to a lawful arrest is still unreasonable if there was time to secure a warrant and none was obtained. In a case strikingly similar to this one, this Court recently held unreasonable the search of a locker shipped from San Diego to Boston even though there was probable cause to arrest,

there was probable cause to search, and a valid arrest had been made:

> [W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to an arrest either if the 'search is remote in time or place from the arrest,' . . . or no exigency exists.

United States v. *Chadwick*, 433 U.S. 1, 15 (1977).

Here, of course, there was no probable cause to arrest, no probable cause to search, and no search warrant. No one has suggested that the police had no time in this case to obtain a search warrant, nor has anyone argued that appellant voluntarily consented to a search. It is a routine search rationale which the government seeks to invoke. Motion to Dismiss or Affirm at 19, 21, 31.

The class of "routine" searches permitted without a warrant, however, is extremely limited. This Court has allowed searches of persons and objects entering the United States across an international border, *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); searches of certain premises licensed for the sale of firearms and liquor, *United States* v. *Biswell*, 406 U.S. 311 (1972); and inventory searches of vehicles properly taken into police custody. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976).[19] Even in this narrow range, however, the search must still be reasonable in light of the purposes to be served and the method of execution.

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[19] In addition, some States allow limited agricultural inspections of vehicles as they cross the State border. These inspections, however, are dependent, at the very least, on some sort of suspicion that a vehicle contains prohibited plants or pests, and are limited in scope. *See, e.g.*, Hawaii Rev. Stat. Title 11 § 150A-5 (Supp. 1977); Arizona Rev. Stat., Title 3 § 3-113 (West 1974).

It is with these principles in mind that the government's "border search" rationale must be examined. As we demonstrate below, theirs is no border search. It is, to return to first principles, a "ridiculous warrant against the whole [Puerto Rican people]." 2 T. May, *The Constitutional History of England*, 243-52 (3d ed. 1889).

B. There Is No Border Between the United States Mainland and the Commonwealth of Puerto Rico.

The United States border—for purposes of custom searches—is defined by 19 U.S.C. § 1202(2), with specificity:

> The term "customs territory of the United States" . . . includes only the States, the District of Columbia, and Puerto Rico.

For purposes of immigration and naturalization as well, Puerto Rico is within the geographical definition of the United States. 84 Stat. 116; 8 U.S.C. § 1101(a)(38).

The customs territory of the United States has always been defined by the United States Congress. Nowhere in the enabling legislation, in the Constitution of Puerto Rico or in the legislative history of the Compact is there anything which suggests that the United States intended to cede the power to establish customs borders to the Commonwealth. On the contrary, the legislative history demonstrates that the grant of power to Puerto Rico is limited to matters of internal self-government. The remarks of Senator Joseph C. O'Mahoney at the hearings approving the Puerto Rican Constitution, held before the Committee on Interior and Insular Affairs of the United States Senate on April 29, 1952, are typical. In response to a question as to what power the United States was ceding to Puerto Rico, Chairman O'Mahoney replied:

> We are giving them the right to govern themselves with respect to matters that are strictly within the domain and the scope of local self-government. It is like the provisions that we talk about giving the people of the District of Columbia the right to handle their own affairs instead of having the Congress of the United States attempt to act as a city council for the District of Columbia.

U.S. Senate, Committee on Interior and Insular Affairs, Hearings Approving Puerto Rican Constitution, April 29, 1952, at 45.

The Senate Report Approving the Puerto Rican Constitution summarized the position of Puerto Rico within the federal system:

> The Commonwealth of Puerto Rico is not a State of the United States. Neither is it an independent republic. It is a self-governing community bound by the common loyalties and obligations of American citizens living under the American flag and the American Constitution and enjoying a republican form of government of their own choosing.

Senate Report No. 1720, June 10, 1952, at 7.

Puerto Rico is incontestably a part of the United States. Its residents are citizens of the United States. 66 Stat. 236; 8 U.S.C. § 1402. Until recently male residents were liable for compulsory service in the United States armed forces. 81 Stat. 100; 50 App. U.S.C. § 454(a). Likewise, Puerto Ricans look to the United States for the defense of the island. 47 Stat. 158; 48 U.S.C. § 733. Interchange of merchandise between Puerto Rico and the mainland is duty-

free. 47 Stat. 158; 48 U.S.C. § 738. If Congress had intended to create a border between the United States and Puerto Rico, it would have made some appropriate provision for one. It has not.

Moreover, the majority of the Puerto Rico Supreme Court below has firmly rejected the argument that the Compact empowered Puerto Rico to create a *de facto* border:

> The special relationship between Puerto Rico and the United States, based on the existence of a compact—Public Law 600, 81st Cong., 1 L.P.R.A., Vol. 1, pp. 136-138—does not empower us to consider the United States as a foreign country and to subject all persons arriving at Puerto Rico from the United States to an indiscriminate search of their persons and their belongings, without a search warrant and without probable cause or reasonable grounds. The Commonwealth is not an associated republic. Far from that, it is a political condition adopted by us in Puerto Rico based on, among other fundamental principles, our union with the United States. . . .
>
> (Juris. St., App. A at 19-20.)

No one questions that there are substantial differences between the government of Puerto Rico, the separate States and other territories of the United States. Puerto Rico's taxing structure is different. 69 Stat. 427, 48 U.S.C. § 734; 68A Stat. 293; United States Internal Revenue Code 933. There are a few special provisions relating to Puerto Rican economic interests and external commercial relations. 47 Stat. 158, 48 U.S.C. §§ 739, 740; 50 Stat. 843, 48 U.S.C. § 741; 49 Stat. 665, 19 U.S.C. § 1319a. These differences, however, do not confer upon Puerto Rico the power which its government claims for it here. The fact is that Puerto

Rico may no more create a border than it may raise a standing army."

C. The Challenged Searches Are Neither Made at the Functional Equivalent of a Border Nor Otherwise Exempt from Warrant and Probable Cause Requirements.

The government seeks to justify this search as one which occurred at an "intermediate border." That characterization, however, cannot insulate the search from the warrant and probable cause requirements of the Fourth Amendment.

The claimed "intermediate border" offered by the government is, of course, not the "functional equivalent" of a true border. Such "functional equivalents" are extensions of the international border, where neither probable cause nor a warrant is required. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (1973). Thus, St. Louis airport is the functional equivalent of a border for a non-stop flight from Mexico City. Similarly, a station "at a point marking the confluence of two or more roads that extend from the border" may be the border's functional equivalent. 413 U.S. at 273. Federal officers may conduct routine searches there because it is impossible or highly impracticable for them to do so at the true border. The St. Louis police, however, have no power to conduct their own searches at that functional equivalent. It is not they who are entrusted with the authority to conduct federal customs searches. *See, Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976).

It is true that this Court has permitted warrantless *stops* by federal officers at points removed from the border

[34] *See, Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (1973), predicating the right to conduct border searches on "Federal" authority at "international" borders.

or its functional equivalent. *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976). The government's reliance on that rationale is, however, misplaced. First, the stops there were conducted by officers who would have had full authority to search at the true border. Second, the stops are just that: stops. In *Martinez-Fuerte* the Court permitted stops without "reasonable suspicion" for routine questioning, but it reiterated its holding in *United States* v. *Ortiz,* 422 U.S. 891 (1975) that "checkpoint searches are constitutional only if justified by consent or probable cause to search." 428 U.S. at 567. Even the stops permitted by *Martinez-Fuerte* were allowed only because they were at "fixed checkpoints" and because the "reasonable suspicion" standard was "impractical because the flow of traffic tends to be too heavy to allow . . . particularized study of a given car. . . ." 428 U.S. at 557. At other than fixed checkpoints, the requirement of "reasonable suspicion" before a stop remains. *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 883 (1975).

In no event has this Court countenanced full searches at checkpoints of any sort on anything less than probable cause. *United States* v. *Ortiz,* 422 U.S. 891, 897 (1975); *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 273 (1973). Here, the police did not even have reasonable suspicion, yet they conducted a full search.

If Puerto Rico may conduct searches of incoming mainland passengers, surely New York City can conduct searches at its airports, docks, highways and bridges. Its officers, too, may rummage at will through the luggage of our citizens. If Agent Marcano may single out Terry Torres, open his suitcase and discover an ounce of marihuana, officer Jones may single out any person, open his or her luggage and discover the most intimate of personal articles. The intrusion is real, humiliating and totally unjustified.

The search below, by any name the government chooses to call it, is constitutionally intolerable.

D. The Asserted Needs of Law Enforcement Cannot Justify Puerto Rico's Departure From the Principles of the Fourth Amendment.

The "Statement of Motives" which introduces Public Law 22 begins as follows:

> Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.
>
> Laws of Puerto Rico (West, 1975) at 658-59; App. at 4a.

The Statement goes on to relate that "it is widely known" that some incoming passengers and crew from the mainland bring with them such controlled substances and that the federal government does not require these passengers and crew to go through customs inspections upon their arrival. This failure to inspect, the Statement concludes, "has contributed greatly to an increase in the smuggling of" contraband, with a resulting "rise in criminality and greater insecurity among the citizenship." *Id.*

The prevailing minority of the Puerto Rican Supreme Court emphasized the gravity of the harm which Public Law 22 seeks to prevent. That harm, the minority argues, when combined with the island's inherent susceptibility to illegal traffic in guns and narcotics, justifies the use of Public Law 22 to protect the populace. Thus, Justice Diaz emphasized that Puerto Rico is completely surrounded by international waters. The result, he stated, is:

> . . . a severance of the geographic continuity which merges 48 of the states of the Union into a single territorial body whose safety and order is protected by Congressional and state legislation. Hence, those states are not as vulnerable as Puerto Rico to the entry into their territories of smugglers and traffickers of illegal merchandise.
>
> Juris. St., App. A at 45.

Similarly, at the trial court level, Judge Figueroa relied on the "peculiar condition of the island" to justify Public Law 22:

> because of the peculiar condition of our island, the unrestricted ease with which American citizens travel from any point in the United States to Puerto Rico, and vice versa, the frequency with which domestic flights arrive at and depart from our airport, and also because the inspection carried out under [Public Law 22] is not covered by the federal government.
>
> Juris. St., App. C at 115.

These arguments will not hold. Puerto Rico's "peculiar condition" is shared by Hawaii which is even further removed geographically from the mainland. It is also shared with the Island of Manhattan. Certainly, people travel with "unrestricted ease" from any point in the United States to Manhattan Island and vice versa. "[D]omestic flights arrive at and depart" from New York with at least as much frequency as they arrive and depart from San Juan. And as in Puerto Rico the federal government does not carry out inspections between New Jersey and New York. Yet it is inconceivable that New York would be allowed to institute anything resembling Public Law 22.

The fact is that its geographical isolation may afford even greater protection to Puerto Rico than to the states of the mainland. Unlike most states, entry into Puerto Rico is made primarily through one point—the San Juan airport. Using normal police procedures, including probable cause to arrest, the San Juan police may focus on a single point of entry rather than being forced to patrol an entire state boundary for illegal drug traffic.

Due to modern conditions of travel and communication, Puerto Rico is simply not as peculiar as its government would have us believe. Mr. Justice Irizarry writing for the majority, pinpointed the fallacy:

> . . . We are an island with regard to travel by sea. When traveling by plane there is no difference between going from here to Miami or from Miama [sic] to New York.
>
> Juris. St., App. A at 21.

The analogy between Puerto Rico and New York City is especially apt. Manhattan is, of course, an island. Unlike Puerto Rico, however, it has many points of entry and egress by bridge and by tunnel, a fact which increases the difficulty of controlling illegal traffic from other states. The extent of New York City's crime problem is both well-known and well-documented. *See, e.g.,* Gottfredson, *et al., Sourcebook of Criminal Justice Statistics* 354-66 (1977). In 1975, the personal robbery rate in New York City was 2,386 for every 100,000 residents. Gottfredson, *supra,* at 354. By contrast, the personal robbery rate in Puerto Rico for 1975 was 150 per 100,000 inhabitants.[35] Puerto Rico

[35] Puerto Rican statistics differentiate between street robberies and residential robberies. In 1975, street robberies occurred at a rate of 115 per 100,000 inhabitants. Residential robberies occurred at a rate of approximately 35 per 100,000 residences. *Puerto Rico Crime Comm'n, supra,* at 26.

Crime Commission, *Comprehensive Criminal Justice Plan* 26 (1977). While comparable statistics for New York City and San Juan are not available for 1976, the rate for violent crime for New York State as a whole was 868.1 per 100,000 inhabitants as compared to 514.8 per 100,000 in Puerto Rico.[36]

The State of New York has instituted severe penalties, including mandatory maximum life terms, for certain narcotics offenses. *See, e.g.,* N.Y. Penal Law § 220.43 (McKinney 1975); N.Y. Penal Law § 70.00 (McKinney Supp. 1977). Yet, despite the severity of its crime problem, New York has never attempted to suspend the basic protections of the Fourth Amendment as Puerto Rico has done with Public Law 22.

The prevalence of illegal narcotics is a nationwide problem which is not unique to Puerto Rico. For example, in an attempt to control illegal traffic in drugs, the federal Drug Enforcement Agency ("DEA") instituted special surveillance of airline flights to and from cities which it had identified as nationwide drug distribution centers. *United States* v. *Craemer,* 555 F.2d 594, 595 (6th Cir. 1977). The prime component of the program is a "drug courier profile" which sets forth certain characteristics common to travelers carrying illegal drugs. While the precise characteristics remain secret, they include the following:

> . . . (1) the use of small denomination currency for ticket purchases; (2) travel to and from major drug import centers, especially for short periods of time; (3) the absence of luggage or use of empty suitcases on

[36] Federal Bureau of Investigation, *Crime in the United States—1976 Uniform Crime Reports* 50, 53 (1977). The FBI defines "violent crime" as murder, forcible rape, robbery and aggravated assault.

trips which normally require extra clothing; and (4) travel under an alias.

United States v. *Van Lewis*, 409 F.Supp. 535, 538 (E.D. Mich. 1976).

In overturning convictions obtained through use of the DEA drug profile, the Sixth Circuit has stated emphatically that, taken alone, the drug courier profile will not justify even the limited search allowed pursuant to an investigative stop in *Terry* v. *Ohio*, 392 U.S. 1 (1968). *United States* v. *Craemer*, 555 F.2d 594, 597 (6th Cir. 1977); *United States* v. *McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977). It most certainly does not give rise to probable cause to make an arrest, thereby justifying a full-scale search of both the individual and his luggage. *United States* v. *Lewis*, 556 F.2d 385, 389 (6th Cir. 1977). The Sixth Circuit reasoned that, even assuming that an adequate profile could be drawn, it is still "too amorphous to be integrated into a legal standard." Thus, federal drug enforcement officials are held to the standards of the Fourth Amendment. Travelers subject to the jurisdiction of the San Juan Police are entitled to no less.

Assertions of the needs of law enforcement have been consistently rejected as justification for abandoning Fourth Amendment principles. As Mr. Justice Jackson said for the Court in *United States* v. *Di Re*, 332 U.S. 581, 595 (1948):

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to

> place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

This Court has recently reaffirmed that fundamental precept of Fourth Amendment law:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension wth the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.
>
> *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 (1973).

See, also, United States v. *Ortiz*, 422 U.S. 891, 892 (1975); *Mincey* v. *Arizona*, —— U.S. ——, 57 L. Ed.2d 290 (1978).

Nor may this search be justified by analogizing it to preboarding airport weapons searches. This Court has not yet passed on the constitutionality of airport weapons searches. But even if they are upheld, routine weapons searches differ drastically from those conducted under Public Law 22. First, arguably they are justified by the immediate danger of harm to those boarding the plane. Traffic in guns and narcotics has a far less direct effect on its victim with many more intermediate opportunities for police intervention. Second, routine weapons searches are conducted *before* boarding an airplane, not after exiting as was the case here. Third, because they rely on mechanical detection

devices, weapons searches are generally far less intrusive and more limited in scope than the search of appellant at issue here. Fourth, the weapons search is at least impliedly consensual. Notice is given and an individual may forego boarding the airplane rather than submit to the search. *See, United States* v. *Moore*, 483 F.2d 1361 (9th Cir. 1973) (disapproving search conducted after individual had abandoned attempt to board airplane). No such opportunity was afforded appellant. Finally, and most importantly, everyone must undergo search. The blanket nature of the search makes it far more reminiscent of the stop required at a toll booth than the arbitrary and personalized detention to which appellant was subjected.

The search at issue here fails to qualify as an airport weapons search either in fact or by analogy. The differences are simply too great to bring it within the permissible scope of an administrative search.

Puerto Rico has sought to differentiate itself from the mainland as a means of justifying procedures which violate the Fourth Amendment. As demonstrated above, Puerto Rico's island status in no way renders it less able to control illegal traffic than certain other regions of the United States. The stop and search procedures which Puerto Rico has adopted represent serious and unwarranted invasions of both Fourth Amendment protections and the constitutional right to travel. As such, they cannot be allowed to continue.

IV.

Public Law 22 violates the right to travel by imposing an impermissible burden on a class of persons who have recently exercised that right.

Even if Public Law 22 is not invalid under the Fourth Amendment, it impermissibly burdens the federal constitutional right to travel enjoyed by all citizens of the United States.

The right to travel, although nowhere specifically mentioned in the Constitution, "has been firmly established and repeatedly recognized." *United States* v. *Guest*, 383 U.S. 745, 757 (1966). The right is grounded in the Privileges and Immunities Clause (Article IV, Section 2) and in the Fifth and Fourteenth Amendments." *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); *Kent* v. *Dulles*, 357 U.S. 116, 125-126 (1958); *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969). Since these provisions apply to Puerto Rico, the right to travel does as well. *See, Examining Board* v. *Flores de Otero*, 426 U.S. 572, 600 (1976) and 61 Stat. 772, 48 U.S.C. § 737.

This Court has recently stated that the right to travel freely among any of the several states is "virtually unqualified." *Califano* v. *Torres*, —— U.S. ——, 55 L.Ed.2d 65, 69 n. 6 (1978). The Court there "assumed" that the right applies with the same force to Puerto Rico. *Id.*

Public Law 22 penalizes a distinct class of persons who have recently exercised their right to travel from the

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[37] It is therefore not dependent upon a finding by this Court that the Fourth Amendment applies to Puerto Rico.

United States mainland to Puerto Rico. Pursuant to this law, members of the class are subjected to indiscriminate detention, questioning and search of their belongings at the uncontrolled discretion of Puerto Rican officials. Such searches constitute a significant invasion of personal privacy, regardless of whether the Fourth Amendment itself applies to the island. The interest invaded as a result of exercising the right to travel need not be fundamental or even constitutional in order for the right to be infringed. *Shapiro* v. *Thompson*, 394 U.S. 618, 611, n. 6 (1969); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

Nor is it incumbent upon appellant to demonstrate that Public Law 22 actually deters persons from exercising their right to travel to Puerto Rico. This Court, in *Dunn* v. *Blumstein*, 405 U.S. 330, 340 (1972), rejected a similar contention:

> In *Shapiro*, we explicitly stated that the compelling state interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . ." *Id.* at 634. (Emphasis added.)

Thus, the imposition of *any* penalty on the constitutional right to travel must be justified by a compelling state interest. American travelers to Puerto Rico are clearly penalized by Public Law 22, whether it contravenes their right to be free from unreasonable searches and seizures under the Fourth Amendment or whether it is seen as a significant impingement on the human privacy and individual dignity to which our society historically has been committed.[20]

[20] We are not dealing here with a situation analogous to the one presented in *Sosna* v. *Iowa*, 419 U.S. 393 (1975), where a durational residency requirement was upheld in part because the appellant had not been "irretrievably foreclosed", through the exercise of her right to travel, from access to a state-provided benefit. 419 U.S. 393, 406. Once a person's privacy has been violated, it cannot be restored. Public Law 22 "irretrievably forecloses" American travelers from the respect for their personal privacy which the Puerto Rican government is bound to maintain.

A statute such as Public Law 22 is valid only if it is necessary to protect a compelling and substantial governmental purpose which cannot be pursued by a means less restrictive of the fundamental right to travel. *Dunn* v. *Blumstein*, 405 U.S. 330, 340; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964).

The government describes the interest on which it relies as a justification for Public Law 22 as "a serious public safety problem caused by the illegal introduction of firearms, explosives and narcotic drugs throughout airports and docks . . . ." Motion to Dismiss or Affirm at 27, 28. Puerto Rico, however, is not alone. Every state in the Union, as well as the federal Government, faces a similar problem. No other government officials have been granted the sort of investigatory license which the San Juan Police employ under Public Law 22. Nor should they be. Rather law enforcement officials throughout the nation are rightfully required to use the same, less intrusive investigative techniques in dealing with lifelong residents of the area as with travelers passing through.

Public Law 22 imposes a disabling and impermissible diminution on the right to travel to Puerto Rico.

V.

The application below of Article V, Section 4 of the Constitution of Puerto Rico violated the Due Process and Supremacy Clauses of the United States Constitution.

If Agent Marcano had conducted the search with no statutory authority at all, appellant's conviction would long since have been reversed. It would have been reversed because a majority of the sitting members of the Supreme Court of Puerto Rico recognized the patent unconstitutionality of the search. However, the combination of the passage of Public Law 22 and the restraints imposed upon that court by its own Constitution rendered the court incapable of vindicating appellant's fundamental federal rights. When a majority of the court hearing a case is unable to uphold an appellant's constitutional rights, the result violates both the Due Process and the Supremacy Clauses of the United States Constitution.

The bizarre outcome below was the result of Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico. That section provides:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices *of which the Court is composed* in accordance with this Constitution or with law. [Emphasis added.]

The Supreme Court of Puerto Rico is currently composed of eight Justices.[39] For reasons not appearing in the rec-

[39] Prior to 1975, the court was composed of a Chief Justice and eight Associate Justices. By Act No. 29, May 28, 1975, upon request of the Supreme Court, the Legislature of Puerto Rico reduced the number of Associate Justices to six. The Legislature recognized that a vacancy then existed on the court and provided that "[w]hile there is no vacancy in addition to the existing one, the Court shall continue sitting as at present constituted." 4 L.P.R.A. § 31 (Supp. 1977).

ord below, only seven members of the court heard and decided the appeal. Of those seven, four voted to reverse the conviction on the grounds that Public Law 22 was unconstitutional and that the trial court erred in admitting the evidence seized pursuant to the law. Opinion of Irizarry, J. (Juris. St., App. A at 1).

Although a majority of the Justices who heard the case believed Public Law 22 to be unconstitutional, the court nevertheless affirmed the judgment below on the basis of Article V, section 4 of the Constitution of the Commonwealth of Puerto Rico.

On its face, Article V, section 4 is not unconstitutional. Most courts, including this one, decide cases by majority vote.[40] However, in Puerto Rico when less than the full Court sits, a simple majority will not suffice to overturn a local law in the face of a constitutional challenge. Indeed, when the Court sits in divisions of three, as it is empowered to do by Article V, § 4, it is literally impossible for a federal constitutional attack on a local statute to prevail.[41] In *People* v. *Perez*, 83 P.R.R. 518

[40] Only 3 states require more than a simple majority in order to declare a law unconstitutional. Neb. Const. art. V, §2; N.D. Const. art. IV, § 9, Va. Const. art. VI, § 2. In addition, the Florida Constitution provides for a seven-member Supreme Court, of which four members must concur in *all* decisions. Fla. Const. art. 5, § 4(1).

[41] The version of Art. V, § 4 quoted by the Puerto Rican Supreme Court in its opinions below differs slightly from the original version, which appears at 48 U.S.C. § 731d:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions. All the decisions

(1961), for example, the Supreme Court of Puerto Rico held that a defendant's appeal could be heard by a three-member division of the Supreme Court, even though the division was powerless to declare unconstitutional the statute under which defendant was convicted.

There is no doubt that Puerto Rico may restrict the scope of judicial review by its Supreme Court in cases arising under its own constitution. However, when federal constitutional rights are called into question, the effect of Article V, section 4 is to subordinate those rights to local law. Such a result violates both the Due Process and Supremacy Clauses of the United States Constitution.[42]

It is well settled that once a state grants a right of appeal to criminal defendants, federal due process requirements govern the appellate procedure. *Douglas* v. *California,* 372 U.S. 353, *reh. denied,* 373 U.S. 905 (1963); *Griffin* v. *Illinois,* 351 U.S. 12 (1956). *See, Ross* v. *Moffitt,* 417 U.S. 600 (1974).

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of the Supreme Court shall be concurred in by a majority of its members. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

[42] This Court has determined that federal principles of due process govern proceedings in the courts of Puerto Rico. However, the Court has not yet determined whether it is the Fifth or the Fourteenth Amendment which makes those principles applicable. *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 600-01 (1976). Regardless of which due process provision applies, the Supremacy Clause prohibits any violation of federal due process rights by the Commonwealth of Puerto Rico. U.S. Const., art. VI. *See Examining Board* v. *Flores de Otero, supra,* 426 U.S. 572 at 602; U.S. Senate, Report No. 1720, *Approving the Constitution of the Commonwealth of Puerto Rico,* June 10, 1952, 7 (acts of the Puerto Rican Legislature in conflict with Federal Constitution would be null and void).

Puerto Rico provides for appeal from a criminal conviction. 4 L.P.R.A. § 37 (West Supp. 1977). Under the principles enunciated in *Reid* v. *Covert,* 354 U.S. 1 (1957) and *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 600-01 (1976), federal due process requirements must govern Puerto Rican appellate procedures. Thus, in exercising his right of appeal directly to the Puerto Rican Supreme Court, appellant could not be denied a transcript of the trial court proceedings because of an inability to pay. *Griffin* v. *Illinois,* 351 U.S. 12 (1956). Nor could he be denied the right to counsel on appeal, *Douglas* v. *California,* 372 U.S. 353 (1963), nor be made to pay a filing fee. *Burns* v. *Ohio,* 360 U.S. 252 (1959). Yet if this application of Article V, Section 4 is allowed to stand the appellant will have been convicted pursuant to a law which a majority of the Justices sitting were convinced is unconstitutional. When a principled application of the Fourth Amendment is frustrated by the chance mathematics which favor local laws over federal constitutional rights, a criminal defendant has been denied due process of law, and his conviction should be reversed.[43]

This Court has not hesitated to set aside state procedural requirements that interfere with the assertion of federal rights. In *Chapman* v. *California,* 386 U.S. 18 (1967), the Court overturned a state harmless error rule that required the California Supreme Court to affirm a conviction even though the defendants' right to remain silent at trial had been violated.

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[43] The result in the Supreme Court of Puerto Rico is all the more anomalous given the provision for a seven-member court enacted by the Puerto Rican Legislature. See n. 39, *supra.* Thus, appellant not only won a majority of the court that heard his case, but he won the requisite number of votes which the Puerto Rican Legislature intends to be necessary in order to declare a law unconstitutional.

In reversing the convictions, the Court stated:

> With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.
>
> 386 U.S. at 21.

See, Chambers v. *Mississippi,* 410 U.S. 284 (1973). *Cf., Love* v. *Griffith,* 266 U.S. 32 (1924) (local rule concerning mootness must give way to assertion of federal right).

Appellant does not challenge Article V, Section 4 on its face. Rather, he challenges the constitutionality of the provision as applied in his case because it clearly favors local law over the Federal Constitution. By forcing appellant to win more than a simple majority to his point of view, Article V, § 4, places an impermissible burden on the assertion of his federal constitutional rights.

Simple mathematics demonstrates the extent of the burden placed on appellant's federal constitutional rights. Five members of the Supreme Court of Puerto Rico would have had to agree in order to vindicate appellant's Fourth Amendment rights. Only three were necessary to extinguish those rights.

Puerto Rico is included among a distinctly small minority of jurisdictions which require more than a majority in

order to declare a law unconstitutional. Only three other States—Nebraska, North Dakota and Virginia—have similar requirements. See note 40, *supra.* Two of these specifically allow designation of a substitute Justice if a member of the court is absent. Neb. Const. Art. V, § 2; N.D. Const. Art. IV, § 88. The clear weight of authority and usage in the fifty States and throughout the federal courts mandates adherence to simple majority rule. *See, Duncan* v. *Louisiana,* 391 U.S. 145, 161-162 ("It is sufficient for our purposes to hold that a crime punishable by two years in prison is, *based on past and contemporary standards in this country,* a serious crime and not a petty offsense.") (Emphasis added.)

Ohio ex rel. Bryant v. *Akron Metropolitan Park District,* 281 U.S. 74 (1930), does not compel a different result. That case upheld a provision of the Ohio Constitution which prevented the Ohio Supreme Court from declaring a statute unconstitutional unless all but one of the judges agreed or unless the decision affirmed a similar judgment by a state court of appeals. The provision, long the subject of strenuous criticism by the Ohio judiciary, was repealed by popular referendum in 1968. *City of Euclid* v. *Heaton,* 238 N.E.2d 790, 15 O.S.2d 65, 44 O.O.2d 50 (1968).

Unlike the instant case, *Ohio ex rel. Bryant* involved a civil suit. The Court disposed of the due process issue in a single paragraph, emphasizing that plaintiffs had been afforded ample opportunity "to contest all constitutional and other questions fully in the common pleas court and again in the court of appeals . . . ." 281 U.S. at 80. Appellant was provided no such opportunity here.

In the nearly fifty years since *Ohio ex rel. Bryant* the concept of due process has changed so dramatically that

the principles on which the Court relied in that case are no longer applicable. In that period of time, for example, criminal defendants in state courts have been guaranteed the right to trial by jury, *Duncan* v. *Louisiana,* 391 U.S. 145 (1968); to be free of compelled self-incrimination, *Malloy* v. *Hogan,* 378 U.S. 1 (1964); to a speedy and public trial, *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967) and *In re Oliver,* 333 U.S. 257 (1948); to the protection of the exclusionary rule against evidence illegally obtained, *Mapp* v. *Ohio,* 367 U.S. 643 (1961); and to the assistance of counsel, *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

Ohio ex rel. Bryant, arising out of a civil setting, upheld a provision which the voters of Ohio have since rejected. It should not control here.

This Court recently denied certiorari in a case affirmed by an equally divided Supreme Court of Pennsylvania in which all participating judges concluded for various reasons that the judgment was erroneous. *Estate of Wilson* v. *Aiken Industries, Inc.,* —— U.S. ——, 47 U.S.L.W. 3219 (Oct. 2, 1978). Mr. Justice Blackmun concurred for procedural reasons in the denial of certiorari, but at the same time, he expressed "substantial discomfort" with the result. *Id.*

Aiken involved a civil suit with only money damages at stake. Appellant here faces a prison term of from one to three years. When a conviction is affirmed over the objection of a majority of the court which hears the case, more than "substantial discomfort" must arise. Appellant's federal constitutional rights have been subordinated to local law in violation of the Supremacy and Due Process Clauses of the United States Constitution.

CONCLUSION

Set aside the history, the delicate matters of intranational relations, the inevitable stridency on both sides of this issue, and one simple truth remains. Searches of our belongings by anyone are demeaning; they make us feel vulnerable, afraid, less free. Any search not justified by the most substantial of reasons moves us inexorably toward the truly dangerous point at which people do not feel demeaned when they search or are searched, when they accept the intrusion as commonplace.

We do not believe that free America will cease to be if these searches are allowed, anymore than we believe that crime in Puerto Rico will increase if they are rightly condemned. But all of us, searcher and searched alike, will be the less if they are allowed to continue.

Public Law 22 and the search pursuant to that law should be declared unconstitutional, and the case should be remanded to the Supreme Court of Puerto Rico for proceedings not inconsistent with that determination.

Respectfully submitted,

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APPENDIX

APPENDIX

Statutory and Constitutional Provisions Involved

Article IV of the United States Constitution

Section 2, Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Section 3, Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article VI, Clause 2 of the United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 10, of the Constitution of the Commonwealth of Puerto Rico (48 U.S.C. § 731d):

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Wire-tapping is prohibited.

No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause

supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.

Evidence obtained in violation of this section shall be inadmissible in the courts.

Article V, Section 4, of the Constitution of the Commonwealth of Puerto Rico

The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

Article VI, Section 16 of the Constitution of the Commonwealth of Puerto Rico

All public officials and employees of the Commonwealth, its agencies, instrumentalities and political subdivisions, before entering upon their respective duties, shall take an oath to support the Constitution of the United States and the Constitution and laws of the Commonwealth of Puerto Rico.

Article VII, Section 3 of the Constitution of the Commonwealth of Puerto Rico

No amendment to this Constitution shall alter the republican form of government established by it or abolish its Bill of Rights. Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal

Relations Act, and with Public Law 600, of the Eighty-first Congress, adopted in the nature of a compact.

TITLE 48 UNITED STATES CODE §731d (64 Stat. 319)

Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of sections 731b-731e of this title and of the Constitution of the United States.

Upon approval by the Congress the constitution shall become effective in accordance with its terms.

PUBLIC LAW 22: 7th SPECIAL SESSION—7th ASSEMBLY, COMMONWEALTH OF PUERTO RICO

Police—Inspection of Luggage, etc., of Passengers and Crew

[No. 22]

[Approved August 6, 1975]

AN ACT

To empower and authorize the Police of Puerto Rico to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question and search those persons whom the Police have ground to suspect that are illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

STATEMENT OF MOTIVES

Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.

It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law. The Federal Government does not require these passengers or crew to go through the Customhouse after arrival in the Island for inspection of their luggage or person. This has contributed greatly to an increase in the smuggling of firearms, explosives, and narcotic drugs by this means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship.

The inspection of luggage, cargo and persons to reduce the introduction of firearms, explosives, and narcotic drugs illegally brought from the United States to Puerto Rico is a legitimate area of control on the part of our government in exercising its police power, especially when the same is not covered by the Federal Government, and there is no conflict of authority on this matter between both governments.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—

The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain,

question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

Section 2.—

Advertisement of the provisions of this act shall be placed in a visible place on piers and airports by the Police of Puerto Rico for all landing passengers.

Section 3.—

Personnel assigned to implement this act shall wear a uniform as determined by the Police Superintendent, and shall be provided with credentials to be shown to the persons concerned before searching them. The search shall be in a respectful way, and as brief as possible.

Manual search of persons shall be carried out by individuals of the same sex as the person involved, and in appropriate places guaranteeing the greatest privacy.

Section 4.—

The Police Superintendent may request the cooperation and collaboration of any Commonwealth or Federal Agency or department whenever necessary and pertinent for the purposes of this act.

Section 5.—

Funds for the enforcement of this measure shall be appropriated in the General Budget of the Police of Puerto Rico.

—Laws of Puerto Rico, 1975,
West, pp. 658-659

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES, *Appellant*,

v.

COMMONWEALTH OF PUERTO RICO, *Appellee*.

On Appeal From the Supreme Court of the Commonwealth of Puerto Rico

---

BRIEF FOR APPELLEE

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On Appeal From the Supreme Court of the Commonwealth of Puerto Rico

---

BRIEF FOR APPELLEE

TO THE HONORABLE COURT:

This is an appeal from a Judgment entered by the Supreme Court of Puerto Rico on December 14, 1977, in Criminal Case No. Cr-77-24, The People of Puerto Rico v. Terry Terrol Torres Lozada.

The Judgment is found in the Appendix to the Jurisdictional Statement, Appendix B, Page 99, preceded by the Opinions of the Judges, Appendix A, pages 1-98.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

To the four questions presented by appellant a fifth question is added by appellee:

5. Whether appellant timely and properly raised before the Supreme Court of Puerto Rico the question of the conflict between Article V, sec. 4 of the Constitution of Puerto Rico and the Federal Supremacy Clause, Article VI, Cl. 2 of the Constitution of the United States.

COUNTER STATEMENT OF THE CASE

Appellee adopts appellant's statement as amended in its Motion to Dismiss or Affirm.

SUMMARY OF ARGUMENT

1. This Honorable Court is without jurisdiction to entertain the present appeal because appellant did not seasonably raise before the Supreme Court of Puerto Rico the federal questions upon which jurisdiction may be sustained and as a result an appealable final judgment or decree is not presented to the Court.

2. The question of Federal Supremacy, first raised by defendant on appeal, might be decisive in the case and a ruling thereon by the Supreme Court of Puerto Rico is essential to the formulation of a final judgment or decree appealable to this court.

3. Should the Puerto Rico Supreme Court, upon consideration of the issue, find that the Supremacy Clause bars the operation of Article V, Sec. 4 of the Puerto Rico Constitution, the four to three opinion entered in the case would render this case moot.

ARGUMENT

1. Whether This Court Has Jurisdiction to Entertain the Present Appeal.

In the present case, the jurisdiction of the Court depends on whether or not the judgment appealed is a final judgment or decree rendered by the Supreme Court of Puerto Rico in a case where is drawn the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of the validity of the challenged statute.[1]

Prior to 1961 (year in which 28 USC 1258 was enacted) it had been repeatedly held by the Court of Appeals for the First Circuit that the final judgment or decrees entered by the Supreme Court of Puerto Rico would be received by that Court on appeal only if the

---

[1] 28 USC, Sec. 1258, which provides:

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution treaties, or statutes of, or commission held or authority exercised under, the United States. Added Pub. L. 87-189, § 1, Aug. 30, 1961, 75 Stat. 417.

federal questions presented for review were seasonably raised before or considered by the Supreme Court of Purto Rico. *Colon-Rosich* v. *People of Puerto Rico*, 256 F. 2d 393 (1958); *Mario Mercado E Hijos* v. *Lluberas Pasarell*, 225 F. 2d 715 (1955) certiorari denied 76 S. Ct. 309, 350 U.S. 936, 100 L. Ed. 817, rehearing denied, 350 U.S. 977: *Prensa Insular de Puerto Rico* v. *People of Puerto Rico*, 189 F. 2d 1019 (1951); *Ramos* v. *Leahy*, 11 F. 2d 955 (1940); *Corretjer* v. *People of Puerto Rico*, 194 F. 2d 527 (1952).

It was also held that Section 1258 of Title 28 USC had the same meaning as 28 USC 1257, governing the review of decisions from state supreme courts. *Iglesias Costas* v. *Secretary of Finance of Puerto Rico*, 220 F. 2d 651 (1955).

Furthermore this Court has held that when a constitutional question is not timely raised in state court proceedings that question is not open in proceedings on petition for certiorari. *Ellis* v. *Dixon*, 349 U.S. 458, 99 L. Ed. 1231 (1955), rehearing denied 350 U.S. 855, 100 L. Ed. 759. *Flournoy* v. *Wiener*, 321 U.S. 253, 88 L. Ed. 708 (1944). See also *Corretjer* v. *People of Puerto Rico*, 194 F. 2d 527 (1952); *Prensa Insular de Puerto Rico* v. *People of Puerto Rico*, 189 F. 2d 1019 (1951).

And going one step further, this Court has held that the attempt to raise a federal question after judgment by the highest State Court, upon a petition for rehearing, comes too late, unless the court actually entertains and decides the question. *McCorquodale* v. *State of Texas*, 211 U.S. 432 (1908); *Forber* v. *State Council of Virginia*, 216 U.S. 396 (1910); *Consolidated Turnpike* v. *Norfolk & Ocean View Ry. Co.*, 228 U.S. 326 (1913); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179 (1919); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Herndon* v. *Georgia*, 295 U.S. 441 (1935); *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

In the instant case, the main federal question is the conflict between the Supremacy Clause and Article V, Sec. 4 of the Puerto Rico Constitution and this issue was not raised by appellant in his motion for reconsideration, at the time when he already had notice of the number of judges participating in the decision of his case and how they had voted. In fact, the Supremacy Clause conflict is not even raised in appellant's jurisdictional statement. It is in his opposition to the Motion to Dismiss that appellant raises the issue for the first time.

Obviously, the issue was never raised before or considered by the Supreme Court of Puerto Rico and the judgment entered is not an appealable judgment or decree under the provisions of 28 USC 1258.

As to the Puerto Rico Act, No. 22 conflict with the Federal Fourth Amendment, we show hereafter that the Supreme Court of Puerto Rico found for appellant and in fact, on that finding, ruled for a reversal of his conviction and for his acquittal, so, a decision on Federal Supremacy grounds would remove the Puerto Rico Constitution bar to a judgment on those terms on the basis of the four to three vote.

2. Whether Puerto Rico Constitutionally May Enact and Enforce a Law That Authorizes the Indiscriminate, Warrantless Search and Seizure, Without Probable Cause, of Persons and Property Arriving in Puerto Rico From Other Parts of the United States.

Since this question is answered in the negative by the four to three vote of the Supreme Court of Puerto

Rico, there is no controversy requiring adjudication by this Honorable Court. Appellant's thrust is based on the minority dissenting opinions, ignoring that of the majority which holds:[2]

> The second half of section 1 of Act. No. 22 (1975), provides that "in order to detain, question, and search persons" arriving from the United States, the Police must have grounds "to suspect [they illegally carry] firearms, explosives, depressants or stimulants or similar substances." Nevertheless, the first half of said section 1 empowers and authorizes the Police of Puerto Rico "to inspect the luggage, packages, bundles, and bags" of said persons without requiring reasonable grounds. In other words, it authorizes the Police to search the baggage, packages, bundles and bags of passengers indiscriminately. We do not see how this can be done without stopping the person. In fact, appellant was stopped when asked to accompany the agents with his luggage to the Criminal Investigation Bureau's office at the airport, without there being reasonable grounds to believe he was violating the law. Appellant had no alternative in view of said request.
>
> Neither the Fourth Amendment of the Federal Constitution nor Art. II, Sec. 10 of ours distinguish the search of persons from the search of their belongings with regard to the reasonability requirement. The Fourth amendment provides:
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] Jurisdictional Statement, Appendix A, at pages 22 to 24.

And Sec. 10 of Art. II of our Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
>
> "Wire-tapping is prohibited.
>
> "No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported, by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.
>
> "Evidence obtained in violation of this section shall be inadmissible in the courts.
>
> In view of such clear constitutional provisions we must conclude that the searches authorized by Act. No. 22 are prohibited. A law, no matter how commendable its purpose might be, cannot authorize what the Constitution prohibits".

3. Whether Puerto Rico Constitutionally May Create a "De Facto" International Border Between Itself and Other Parts of the United States.

Here again, appellant argues against the minority opinions, ignoring the conclusions of the majority which clearly holds in the negative.[3]

> "Our geographic condition as an island does not justify making our case an exception to the Fourth Amendment. Neither will anyone argue that said exception would prove ineffective for Hawaii and Alaska due to the fact that they are not territories connected to the 48 continental states lying to the south of Canada and to the north of Mexico. Ha-

[3] Id. at pages 20 to 21.

waii is an archipelago more distant from the continent than Puerto Rico. Alaska is peculiar in that it is geographically separate from the other states and has a border with another country. Puerto Rico has no boundaries with other countries.

Besides, although we are an island, our seaports are not the major entries and exists to those traveling between Puerto Rico and the continent. Most people traveling to and from here do so by plane. When traveling by plane, it is irrelevant whether the surface flown over is land or sea. Thus the distinction that could be made regarding our condition as an island is unimportant. We are an island with regard to travel by sea. When traveling by plane there is no difference between going from here to Miami or from Miama (sic) to New York.

Finally, supposing that the Fourth Amendment were not applicable to Puerto Rico to the effects of Act No. 22 discussed here, we cannot disregard the fact that this prohibition would subsist under the Constitution of the Commonwealth which sets as a limit to the police action, apart from the specific prohibition against unreasonable searches, the principle of inviolability of human dignity. Constitutional guarantees were not adopted for a particular time and place. These principles are tested precisely when there is a rise in a certain type of crime and collective hysteria swells, and the courts of justice are the ones called upon to enforce them as essential values of the democratic order that we enjoy."

Adding, later on: [4]

"Another opinion delivered in this case defends the constitutional validity of Act. No. 22 under a theory which states that searches herein authorized may be considered part of the power of the Commonwealth to adopt inspection laws as part of

[4] Id., at pages 26 to 27.

its regulatory power called police power or state police power.

We are not discussing the power of the State and of the Commonwealth to adopt general inspection laws under the police power. We must understand, nevertheless, that the purpose of said laws is to authorize administrative inspections and not those with criminal purposes. None of the authorities cited: *Gibbons* v. *Ogden*, 9 Wheaton 1, 6 L. Ed. 23 (1824), *Brown* v. *Maryland*, 12 Wheaton 419, 6 L. Ed. 678 (1827); *Mayor of New York City* v. *Miln*, 11 Peters 102, 9 L. Ed. 648 (1837); *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U.S. 345 (1898), *Compagnie Francaise* v. *State Board of Health, Louisiana*, 186 U.S. 380 (1902)—upon which said opinion is based—involve statutes authorizing the inspection of objects of persons directed to obtain evidence on criminal activity or to prevent it, as is the case of Act No. 22."

4. Whether Public Law No. 22, 25 L.P.R.A. § 1051, 1054, Unlawfully Abridges the Right to Travel by Subjecting Individuals to Indiscriminate, Warrantless Searches Without Probable Cause Upon Entry Into the Commonwealth of Puerto Rico From Other Parts of the United States.

Again, appellant fails to consider the holding of the majority that: [5]

"To interpret that where Act No. 22 'authorizes the search of passengers' suitcases, bags, and luggage without a search warrant or reasonable grounds, it is merely authorizing administrative inspections under the State's police power, would be to force the letter and spirit of the law beyond what is reasonably permitted. The searches authorized by said statute do not have the exclusive purpose of seizing objects. The facts of this case

[5] Id., at page 30.

demonstrate this Appellant was stopped, accused, tried, and convicted as a result of the search of his luggage conducted pursuant to said act. The police power of the state is not synonymous to the power of the police to stop persons and search them without reasonable grounds. The latter is what Act No. 22 authorizes against the clear constitutional provisions which forbid it".

5. Whether Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico Violates the Due Process and Supremacy Clauses of the United States Constitution by Precluding the Supreme Court of Puerto Rico From Reversing Appellant's Conviction for Possession of Marihuana, Even Though a Majority of the Justices Who Heard the Case Were Convinced That the Conviction Was Obtained in Violation of the Fourth Amendment to the United States Constitution.

Article V, Sec. 4 of the Constitution of the Commonwealth of Puerto Rico reads as follows:

> "The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law."

The last sentence, now in question before this Honorable Court, was part of the original, text amended and approved by Congress by Joint Resolution of July 3, 1952, c 567, 66 Stat. 327. (See also 48 USCA, sec. 731d). But as is the case with all laws, whether federal or state, the statute must fit inside the framework of the Constitution of the United States, or perish.

The preceding three questions advanced by appellant were answered in the negative by four out of seven judges of the Supreme Court of Puerto Rico and, in

the decision of usual civil and criminal cases, this would have resulted in a reversal.[6] Not so in constitutional challenges, where an absolute majority (five judges out of eight) is required by Article V, Sec. 4 of the Puerto Rico Constitution.

But it is the primary responsibility of State Supreme Courts to read state statutes in a way consistent with the Supremacy Clause, Article VI, Clause 2, of the Federal Constitution.[7] When the facts of this case are tested against the Supremacy Clause, three questions inevitably arise:

> 1) Whether the four to three majority vacated appellants' criminal conviction, irrespective of the fate of Act No. 22 of August 6, 1975 (25 LPRA, secs. 1051-1054).

---

[6] Supreme Court of Puerto Rico, Rule 3(a), 4 L.P.R.A. Appendix 1-A which provides:

"Rule 3. Organization of the Court

(a) *Sitting in full*

The Court sitting in full shall take cognizance of the decision of all civil and criminal matters, and shall intervene in complaints against judges and in disciplinary proceedings against and rehabilitation of attorneys.

The decisions of the Court in full shall be adopted by a majority of the justices who participate, but no law shall be held unconstitutional except by a majority of the total number of justices of which the Court is composed.

For the issuance of a writ by the Court in full the votes of at least half of the justices who participate shall be required." (Emphasis supplied)

[7] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2) Whether the four to three majority against the validity of said Act No. 22 on Fourth Amendment grounds annulled that statute, anything in the Constitution or Laws of Puerto Rico notwithstanding.

3) Whether Art. V, sec. 4 of the Constitution of Puerto Rico is fatally unconstitutional.

We assume that, for the purposes of the Fourth Amendment and the Supremacy Clause, the term "state" includes Puerto Rico [8] and the Supreme Court of Puerto Rico is a "state court",[9] and, on that understanding, we invoke the principle that this Court should refrain from intervening in this case until the Supreme Court of Puerto Rico has had the opportunity to answer the three questions arising out of the interaction between Puerto Rico's Act 22 and Constitutional Art. 5, Sec. 4, on one side and the Federal Fourth Amendment and Supremacy Clause on the other side.

As appellant admits in its Jurisdictional Statement, at page 20:

"On April 14, 1978, appellant filed an untimely motion for reconsideration in the Supreme Court of Puerto Rico. The motion alleged that an opera star had recently been searched pursuant to Public Law 22, that the search had generated much publicity and that a newspaper reported that Mr. Justice Rigau had stated that he is now prepared to vote on the constitutionality of Public Law 22. The motion asked that the Court allow Mr. Justice

[8] *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 599 (1976); *Calero Toledo* v. *Pearson Yatch*, 416 U.S. 663, 668 (1974), note 5.

[9] *Allen Corp.* v. *Mejías*, 165 F. Supp. 221 (1958), affirmed 267 F. 2d 550; *RCA del Caribe, Inc.* v. *Silva Recio*, 429 F. Supp. 651 (1976).

Rigau to vote and that it reconsider its interpretation of Article 5 § 4 of the Puerto Rico Constitution. On May 4, 1978, the motion was denied."

These issues are not the ones upon which the appeal is based. The main issue on appeal is whether Article V Sec. 4 of the Puerto Rico Constitution, as applied in this case, conflicts with the Supremacy Clause. That issue has not yet been raised before the Supreme Court of Puerto Rico and until that tribunal decides that issue this case is not ripe for review by this Supreme Court of the United States.

Provisions similar to those of Article V, Sec. 4, appear in the constitutions of several states and their validity has been sustained by this Honorable Court. See *Ohio ex rel Bryant* v. *Akron Metropolitan Park District*, 281 U.S. 74 (1930), *City of Bismarck* v. *Materi*, 177 N.W. 2d 530, 537 (1970), *Funkhouser* v. *Spahr*, 102 Va. 306 46 S.E. 378 (1904). North Dakota, Arizona, Virginia and Colorado have very similar provisions.

On the above, we respectfully submit that Article V, Sec. 4 of the Puerto Rico Constitution is not invalid on its face and that the Supreme Court of Puerto Rico has not been given an opportunity to accommodate it within the framework of the laws and the Constitution of the United States.

CONCLUSION

On the undisputed facts of this case and for the reasons presented above, it is respectfully requested that this appeal be dismissed for failure to present a final judgment or decree appealed on questions of law seasonably presented to or considered by the court below,

or provide such other disposition of the appeal as this Honorable Court may deem proper.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

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ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

APPELLANT'S REPLY BRIEF

The government concedes, as it has in the past, that the Fourth Amendment prohibition against unreasonable searches and seizures is applicable to Puerto Rico as if it were a "state". (Brief for Appellee at 12.) It now also apparently concedes that Public Law 22, 25 L.P.R.A. §§ 1051-54, violates the Fourth Amendment. The government argues that because the majority of the Puerto Rico Supreme Court thought Public Law 22 violates the Fourth Amendment "there is no controversy requiring adjudication by this Honorable Court." (Brief for Appellee at 5-6.) The opinion of the majority below is cited with apparent

approval by the government (*id.* at 5, 7, 9), and nowhere in its brief does the government assert that Public Law 22 *is* constitutional.

Rather than attempting the impossible task of demonstrating the constitutionality of Public Law 22, the government has taken a tack that is praiseworthy for its brevity, but entirely without support in the law. It argues, as we read the brief, that one of the two issues on appeal was not properly presented below and that the alleged failure to present *that* issue below somehow deprives this Court of jurisdiction to hear *any* issue. The government characterizes the challenge to Article V, § 4 of the Puerto Rico Constitution (which requires a 5/8 majority to overturn a statute on constitutional grounds) as the "main issue on appeal." (Brief for Appellee at 13.) That exercise in wishful thinking cannot alter the fact that the Fourth Amendment is indeed the main issue on appeal. Furthermore, the assertion that the Article V, § 4 issue was not properly raised is without merit in any event, and whatever the merits of the government's argument with respect to Article V, § 4, the disposition of that issue cannot affect the power of this Court to strike down Public Law 22 for the constitutional outrage that it is.

1. The Challenge to Article V, § 4 Was Properly Raised Below and Is Properly Before This Court.

The government argues that the effect of the Supremacy Clause should not be considered because it was not specifically mentioned in the Petition for Reconsideration or in the Jurisdictional Statement. That contention ignores the reality of our federal system. Far from requiring specific mention, operation of the Supremacy Clause is implicit in every constitutional argument made. Indeed, this Court has described the clause as "the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law." *Swift & Co. v. Wickham,* 382 U.S. 111, 123 n.18 (1965).

The Supremacy Clause pervades constitutional decision-making in a manner unlike that of any other provision. Chief Justice Marshall described the operation of the Clause in *McCulloch v. Maryland,* 4 Wheat. 316, 4 L.Ed. 579 (1819). There, counsel for the United States had argued that the State of Maryland lacked the power to tax a branch of the bank of the United States. The Chief Justice said:

> There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds.
>
> This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, *which may be almost termed an axiom, other propositions are deduced as corollaries,* on the truth or error of which, and on their application to this case, the cause has been supposed to depend.
>
> 4 Wheat. at 426, 4 L.Ed. at 606 (emphasis added.)

Since this Court's decision in *Martin v. Hunter's Lessee,* 1 Wheat. 304, 341-44 (1816), the Supremacy Clause has been understood to require the subordination of local law to federal law whenever the two are in conflict. This unconditional allegiance to the principles embodied in the Federal Constitution is formalized in the oath of office taken by all members of the judiciary of Puerto Rico. Constitution of the Commonwealth of Puerto Rico, Art. VI, § 16 (48 U.S.C. § 731d); Puerto Rican Federal Relations Act, 47 Stat. 158, 48 U.S.C. § 874. Consideration of the Supremacy Clause is therefore implicit in every decision rendered by the courts of Puerto Rico where a possible conflict between federal and local law is raised.

Moreover, Appellant's Motion for Reconsideration left no doubt as to the Supremacy Clause problems raised by Article V, § 4. In that motion, Appellant claimed that application of Article V, § 4 deprived him "of his right to a full and fair hearing as required by the case of *Stone v. Powell,* 428 U.S. 465 . . . ." (Motion for Reconsideration, ¶ 7, reprinted in Motion to Dismiss or Affirm at App. A, pp. 3a-4a.) The concept of a "full and fair hearing" under *Stone* presupposes adherence by local courts to the mandate of the Supremacy Clause.

> [W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Martin v. Hunter's Lessee, 1 Wheat. 304, 341-344, 4 L.Ed. 97 (1816).

428 U.S. 465, 493 n.35.

Article V, § 4 rendered the Supreme Court of Puerto Rico incapable of performing its "constitutional obligation to safeguard personal liberties and to uphold federal law." 428 U.S. at 493 n.35. Appellant's Motion for Reconsideration afforded the court ample opportunity to review its decision in light of its constitutional obligations. Its refusal to do so places the matter squarely within the jurisdiction of the Supreme Court of the United States.

Nor has this Court insisted that petitioners correctly specify the constitutional provision on which they base their appeals. In *Braniff Airways v. Nebraska State Board,* 347 U.S. 590 (1954), the appellant relied on the Commerce Clause rather than the Due Process Clause of the Fourteenth Amendment, thereby "nam[ing] the wrong constitutional clause to support its position." 347 U.S. at 598. The Court found: "Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." 347 U.S. at 599. The underlying intendment is no less obvious here, where the clause invoked goes to the very essence of our federal system.

Finally, the government continues to argue that Appellant's challenge to Article V, § 4 of the Puerto Rico Constitution was not timely and that an issue raised for the first time in a petition for rehearing comes too late.

It is beyond dispute, however, that Appellant could not have raised the issue before the judgment of the Puerto Rico Supreme Court had been rendered. He had no idea who would participate or what the vote would be. Moreover, Rule 45(d) of the Rules of the Puerto Rico Supreme

Court (quoted in the Motion to Dismiss or Affirm at 7) expressly provides for consideration of untimely petitions for reconsideration so long as "execution of the mandate" is not adversely affected. Since the Puerto Rico Supreme Court had already stayed the mandate pending appeal to this Court, the mandate could not have been adversely affected by that court's reconsideration.

Indeed, in *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74, 79 (1930), the continuing validity of which is called into question here, the issue was raised for the first time after judgment, and it was fully considered on the merits by this Court. *See, Great Northern R. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358-366-67 (1932); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677-78 (1930).

2. The Judgment Below Is Final.

The government presents the novel argument that the challenge to Article V, § 4 was not properly raised below and that, therefore, "the judgment entered is not an appealable judgment or decree under the provisions of 28 USC 1258." (Brief for Appellee at 5.) As we understand it, the government appears to contend that if one issue is not presented to a court below, an appellant may never appeal at all because the judgment below is not "final" until all conceivable issues are decided.[1] This argument ignores the fact that Appellant's challenge to Article V, § 4 is based on both the Due Process and the necessarily

[1]In its Motion to Dismiss or Affirm the government also claimed that the issue had not been properly raised, but it apparently recognized that such a failure would only affect that issue and not the jurisdiction of the Court over other issues. (Motion to Dismiss or Affirm at 4.)

included Supremacy Clause of the United States Constitution. The government does not question that Appellant's due process claim was explicitly raised in his Motion for Reconsideration and passed upon by the Supreme Court of Puerto Rico.

The government's reliance on the final judgment rule is similarly misplaced. The final judgment rule has nothing to do with what issues were presented. A final judgment

> must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.
>
> *Market Street Ry. Co. v. Railroad Commission,* 324 U.S. 548, 551 (1945).

The same standard is applicable to appeals from the Puerto Rico Supreme Court. *Buscaglia v. District Court of San Juan,* 145 F.2d 274, 280-81 (1st Cir. 1944), *cert. denied,* 323 U.S. 793 (1945).

The Judgment is reproduced at Appendix B to the Jurisdictional Statement (pp. 99-100). It speaks for itself:

> JUDGMENT
>
> San Juan, Puerto Rico, December 14, 1977
>
> The search of appellant's belongings being based on the provisions of Act No. 22 of August 6, 1975, and considering the absence of the majority vote required by the Constitution to annul said Act, the judgment appealed is affirmed. Mr. Justice Rigau took no part in this decision. Mr. Justice Irizarry Yunqué delivered an opinion based on the unconstitutionality

of said law. Mr. Chief Justice Trías Monge and Mr. Justice Dávila and Torres Rigual concur with said opinion. Mr. Justices Martín, Díaz Cruz, and Negrón García rendered separate opinions establishing the legality of the search and the constitutionality of the law.

It was so decreed and ordered by the Court and certified by the Chief Clerk. (Footnote quoting Article V, § 4 omitted.)

3. The Judgment Appealed From Is One "In Favor of the Validity" of Public Law 22 and This Court's Appellate Jurisdiction Was Properly Invoked.

The government would have this Court interpret the word "decision" in 28 U.S.C. § 1258(2) to mean "opinion" rather than judgment. It appears to argue that the Court has no appellate jurisdiction because the majority below adopted Appellant's position even though the judgment, if upheld, would send him to prison.

The fallacy of such reasoning should be self-evident. The purpose of § 1258(2) is to facilitate review by this Court when a statute is challenged on federal constitutional grounds and when, after all is said and done in the Puerto Rico courts, the statute still stands. The word "decision" here was obviously intended to mean the same as "judgment". *See, In the Matter of the Application of Tiffany,* 252 U.S. 32, 36 (1920); *Catlin v. United States,* 324 U.S. 229, 233 (1945).

Even if the government's play on words had any merit it would not affect this Court's jurisdiction, since an "unrestricted notation of probable jurisdiction of the appeal is to be understood as a grant of the writ [of certiorari] . . . ." *Mishkin v. New York,* 383 U.S. 502, 512 (1966); 28 U.S.C. § 2103, 76 Stat. 556.

4. The Government's Discussion of the Merits of Appellant's Challenge to Article V, § 4 Is Both Unpersuasive and Inaccurate.

The government cites three cases in support of its proposition that "[p]rovisions similar to . . . Article V, Sec. 4, appear in the constitutions of several states and their validity has been sustained by this Honorable Court." (Brief for Appellee at 13, ¶ 2.)

The government's citations are misleading at best. In fact, only one of the cases cited was rendered by this Court. *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74 (1930). Nor does the government attempt to refute Appellant's analysis of that case. See Brief for Appellant at 65. The government's second case, *City of Bismarck v. Materi,* 177 N.W. 2d 530 (N.D.1970), discusses the state constitution's full-majority provision, but does not examine or uphold its validity.

Nor does the third case cited by the government, *Funkhouser v. Spahr,* 102 Va. 306, 46 S.E. 378 (1904), rule specifically on the constitutionality of the state's full-majority provision. It simply holds that the provision did not apply to the case before it. 46 S.E. at 380.

The government concludes its review of state provisions which require full majorities with this sentence: "North Dakota, Arizona, Virginia and Colorado have very similar provisions." (Brief for Appellee at 13.) The government

fails to provide supporting citation for its proposition. Nor can it. The Arizona and Colorado constitutions do not require greater than normal majorities. They require only that the court sit en banc before it may declare a law unconstitutional. Ariz. Const. art. 6, § 2; Colo. Const. art. VI, § 5(1).

CONCLUSION

The government's attempt to deflect the Court from the Fourth Amendment issue has no basis in law. For the foregoing reasons and those presented in the Brief for Appellant, the conviction should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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---

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

INTEREST OF AMICUS[1/]

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 200,000 members, dedicated solely to defending the principles of freedom and democracy embodied in the Bill of Rights.

1/ Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

Central to those freedoms is the right to be free from unreasonable government searches and seizures protected by the Fourth Amendment. That Amendment erects a critical barrier between the government and the citizen, and it defines the procedures and standards which the government must follow whenever it seeks to invade "the right of the people to be secure in their persons, houses, papers, and effects . . . ."

The ACLU has repeatedly urged upon this Court a "strict construction" of that Amendment. Puerto Rico has now, by statute, removed from the protections of the Fourth Amendment the privacy of the nearly 2,000,000 persons who annually enter Puerto Rico from the mainland United States. 2/ It is the purpose of this amicus brief to show that this statute is inconsistent with the Fourth Amendment.

2/ See Commonwealth of Puerto Rico Tourism Company, Tourism Industry of Puerto Rico, Selected Statistics (1978).

STATEMENT OF THE CASE

This case involves the warrantless search of luggage belonging to a United States citizen arriving in Puerto Rico on a non-stop flight from the mainland United States. The search consisted of a thorough rummaging through the contents of appellant's suitcase in the baggage claim area of the San Juan airport. It was conducted over appellant's clearly articulated objection and, as both the courts below have held, without probable cause or reasonable ground to suspect that a crime had been committed. The baggage searched contained approximately one ounce of marijuana. The search led directly to appellant's arrest and conviction.

Only seven of the eight justices who compose the Supreme Court of the Commonwealth of Puerto Rico participated in appellant's appeal to that court. Four of the seven found the Puerto Rican statute authorizing random, indiscriminate searches of personal belongings entering Puerto Rico from the United States to be a clear

violation of the Fourth Amendment. Their majority opinion specifically rejected the contention that the warrantless search of appellant's suitcase was permissible under this Court's "border search" exception to the Fourth Amendment, and ruled that the Puerto Rican legislature had not enacted the statute authorizing the search with the intention of furthering the Commonwealth's power to conduct reasonable administrative inspections in the interest of public health and safety. However, the four-man majority was prevented from reversing appellant's conviction by Article 5, § 4 of the Constitution of Puerto Rico, which empowers the Supreme Court of Puerto Rico to declare Commonwealth laws unconstitutional only by a majority vote of all the justices who compose the court, that is, by a vote of at least five justices.

The majority opinion of the court below concluded, "The judgment appealed should be reversed and the appellant acquitted." Juris. Stat. App. A, at 30. But the judgment entered by the Chief Clerk of that Court declared "[T]he judgment appealed is affirmed." Juris. Stat. App. B, at 100.

SUMMARY OF ARGUMENT

The Fourth Amendment creates a justifiable expectation of privacy in the contents of a closed suitcase a person has in his possession. United States v. Chadwick, 433 U.S. 1 (1977). In the absence of exigent circumstances, or one of the other "jealously and carefully drawn" exceptions to the Fourth Amendment's warrant requirement, any warrantless search is per se unreasonable, and the fruits of that search are inadmissible in court. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see also Mapp v. Ohio, 367 U.S. 643 (1960). The boundary between the mainland United States and Puerto Rico is not an international border, or a "functional equivalent" thereof, justifying invocation of the "border search" exception to the Fourth Amendment. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). Nor would the "border search" exception itself, even if it applied, permit the extended, wholly discretionary intrusion which took place in this case without a showing of reasonable suspicion or probable

cause. Almeida-Sanchez v. United States, supra. Moreover, the statute authorizing the search has been authoritatively construed by Puerto Rico's highest court as not being an exercise of the power to conduct reasonable administrative inspections to protect public health and safety, a construction which binds this Court unless it is "inescapably wrong." Fornaris v. Ridge Tool Co., 400 U.S. 41, 43 (1970)(per curiam). And even if the statute had been enacted to protect public health or safety, this search would still be unconstitutional because it was conducted without a warrant and pursuant to no "specific neutral criteria" serving to assure equitable application. Marshall v. Barlow's, Inc., ___ U.S. ___, 56 L.Ed.2d 305, 318 (1978).

In addition, state courts have an unqualified obligation to enforce federal constitutional rights. U.S. Const. Article VI, cl. 2; see also Testa v. Katt, 330 U.S. 386 (1947). The provision of the Constitution of Puerto Rico which prevented the majority of the justices who heard appellant's case from entering an order reversing his conviction, despite their ruling that the conviction violated his federal

constitutional rights, contravenes that obligation. Moreover, as applied to this case,3/ it denies the appellant equal protection of the laws. Article V, § 4 of the Constitution of Puerto Rico arbitrarily and capriciously disadvantages appellant, compared with other petitioners in the Supreme Court of Puerto Rico raising identical legal claims, by penalizing him because all eight justices did not participate in his case. It also unfairly discriminates against him, compared with other persons convicted of the identical crime, because the basis of his appeal was a particular constitutional claim, which requires five votes to prevail, rather than an evidentiary or other claim, which requires only a majority of those sitting to prevail.

Finally, the provision violates due process by unfairly shifting the burden of persuasion on appeal. Puerto

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3/ The distinction between facial unconstitutionality and unconstitutionality as applied is somewhat artificial in this case. Article V, § 4 is only operative when fewer than all eight justices participate in a given case. If all eight justices are sitting, ancient common law principles of majority rule govern their decisions. See FTC v. Flothill Products, Inc., 389 U.S. 179 (1967).

Rican law permits final decisions in criminal cases involving the constitutionality of state statutes to be rendered by a three-judge panel of the Commonwealth's Supreme Court, see, e.g., People v. Perez, 83 P.R.R. 518 (1961). But when fewer than five justices sit, under Article V,§ 4 it becomes mathematically impossible for an appellant challenging the constitutionality of a Puerto Rican statute to prevail. Similarly, it becomes impossible for a prosecutor in such a case to lose.

In light of this Court's recent curtailment of the right to federal collateral attack of a state conviction on Fourth Amendment grounds, this procedure is especially troublesome when a defendant seeks to present a Fourth Amendment issue in a direct state court appeal. Stone v. Powell, 428 U.S. 465 (1976). The same notions of equal institutional competence as between state and federal courts which supported the result in Stone v. Powell, supra, require the Court to set aside this state rule. For this case challenges Stone v. Powell's most basic premise: the majority of the court below, acting fully in accordance with state law, was required

to affirm a conviction which this Court, acting under federal law and the Constitution, is required to reverse. There simply cannot be room in our federalism for such a right-denying anomaly.4/

4/ Although amicus urges the Court to set Art. V, § 4 of the Constitution of Puerto Rico aside as unconstitutional, there are also less drastic remedial alternatives open to the Court. For example, the Court might remand the case to the Supreme Court of Puerto Rico so that the state court might fashion in its own remedies. Two possibilities upon remand would be entry of an order reversing appellant's conviction, but lacking in precedential effect, and/or a new court rule requiring automatic rehearing before the entire court within a set period of time whenever the situation presented here arises, in the absence of which an order reversing the conviction shall be entered. The Court may also wish to order, as it has done before, Dowd v. United States Ex Rel. Lawrence Cook, 340 U.S. 206 (1951), that appellant be given a new, out-of-time hearing before the entire Supreme Court of Puerto Rico.

ARGUMENT

I. THE WARRANTLESS SEARCH AND SEIZURE OF PERSONAL LUGGAGE IN APPELLANT'S POSSESSION WAS CONDUCTED WITHOUT PROBABLE CAUSE, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, AND IN DIRECT VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHTS.

The Fourth Amendment's mandate is clear and unambiguous:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In determining the Fourth Amendment's applicability to a particular governmental intrusion, the only question is whether the person searched had "a reasonable expectation of privacy" in the place or item searched. Katz v. United States, 389 U.S. 342, 360 (1967)(Harlan, J. concurring). An owner does have a reasonable expectation of privacy with respect to securely closed personal luggage in his possession. United States v. Chadwick, supra.

Thus, the only issue before the Court is whether this warrantless search may be justified by some special circumstance. However, as this Court has repeatedly warned:

> [T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'
> Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971)(citations omitted).

Puerto Rico has not met that high burden.

First, the Puerto Rican statute authorizing the search does not require or even mention probable cause. It subjects "the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States" to highly intrusive and indiscriminate police "inspections" without requiring any suspicion of crim-

inal activity whatever. P.R. Laws Ann. tit. 25, § 1051.[5/] This Court has held that in the absence of probable cause, any police intrusion on an individual's privacy must be limited to that which is necessary to protect the officer's personal safety, and that even such a limited frisk may be conducted only after an officer has reason to suspect that the person he

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5/ P.R. Laws Ann. tit. 25, § 1051 provides:

> The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

The courts below construed this section as establishing two different standards, one for searching luggage and one for "detaining, questioning, and searching" persons. Only the first clause is relevant here. Insofar as the latter clause authorizes a full-blown "search" on less than probable cause, it is also clearly unconstitutional under Terry v. Ohio, supra.

has detained is dangerous or armed. Terry v. Ohio, supra; see also Chimel v. California, 395 U.S. 752 (1969)(search incident to arrest limited to places where the prisoner might immediately reach to obtain a weapon).

Second, the trial judge specifically held, and all seven justices of the Puerto Rican Supreme Court sitting on the case agreed, that there was no probable cause for this search. The fact that the officers on the scene did not attempt to frisk appellant, together with his calm request to telephone a lawyer, only confirms that he was considered neither dangerous nor likely to flee the scene. In short, the courts below were entirely correct in holding that this search -- and with it appellant's conviction -- must stand or fall on the constitutionality of the completely indiscriminate, highly intrusive, and wholly discretionary police practice authorized by P.R. Laws Ann. tit. 25, § 1051.[6/]

6/ The Commonwealth has never contended that the Fourth Amendment is inapplicable in Puerto Rico, and the Puerto Rican courts involved in this case have assumed

(Footnote 6 continued on next page)

In its Motion to Dismiss or Affirm submitted to this Court, the Commonwealth

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(Footnote 6 continued)
that it applies. See also People v. Caballero, 100 P.R.R. 146 (1971). Although this Court has never definitively ruled that the Fourth Amendment applies to Puerto Rico, see, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n. 5 (1974), it has held that the general protections of due process do apply there, through either the Fifth or the Fourteenth Amendments. Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599-600 (1976). Relying upon the Court's statements in Calero-Toledo, and Examining Bd., both supra, as well as their own long experience in dealing with the intricacies of Puerto Rico-United States legal relations, the lower federal courts within whose jurisdiction Puerto Rico lies have consistently held that full Fourth Amendment protections are in effect there. Cf. United States v. Villarin-Gerena, 553 F.2d 723 (1st Cir. 1977); United States v. Meyer, 536 F.2d 963 (1st Cir. 1976); United States v. Diaz, 535 F.2d 130 (1st Cir. 1976); Amesquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), cert. denied, 424 U.S. 916 (1976). Application of the Fourth Amendment does not disrupt the Commonwealth's internal affairs because the protections against unreasonable searches and seizures included in the Constitution of Puerto Rico are more stringent than those contained in the Fourth Amendment. See Article 1, § 4 of the Constitution of Puerto Rico (wiretapping unconstitutional; exclusionary rule made a constitutional principle).

suggested two justifications for the procedure authorized by P.R. Laws Ann. tit. 25, § 1051: (1) it represents a legitimate exercise of the Commonwealth's power to patrol its "border" with the United States, and (2) it is a legitimate exercise of the Commonwealth's power to conduct reasonable inspections to protect public health and safety. Both justifications were rejected by the majority of the Supreme Court of Puerto Rico, and neither withstands analysis.7/

7/ Several other arguments suggested by the Commonwealth may be disposed of summarily. First, the contention that Puerto Rico is entitled to evade the clear commands of the Fourth Amendment because it is an island is frivolous on its face. The applicability of the Fourth Amendment is a matter of law, not geography. By the Commonwealth's reasoning, the Fourth Amendment would have to be held inapplicable to Manhattan, Long Island, Martha's Vineyard, Nantucket, Hilton Head, and Key Biscayne, as well as parts of Maine, Alaska, and California, and the entire state of Hawaii. Second, the notion that appellant may be deemed to have consented to the search because warnings concerning the existence of P.R. Laws Ann. tit. 25, § 1051 were posted in San Juan airport is equally frivolous. The trial court found that no such warnings were posted on the airplane on which appellant arrived or at
(Footnote 7 continued on next page)

The Commonwealth's argument that the boundary between Puerto Rico and the United States constitutes the "functional equivalent" of an international border fundamentally misconstrues the Court's holding in Almeida-Sanchez v. United States, supra, at 272. The Commonwealth argues that its special status requires that it be recognized as a semi-independent, semi-sovereign nation with power to suspend constitutional rights. But Almeida-Sanchez, supra, was not concerned with degrees of sovereignty. It was concerned with the different Fourth Amendment standards that might be applicable at different distances from true international borders. This Court's holding with regard to the right of the Post Office to inspect incoming foreign mail

(Footnote 7 continued)
the mainland airport from which he departed on his non-stop flight. Moreover, even if the warnings in San Juan airport had convinced appellant that he should leave the island immediately in order to avoid consenting to a search, he still would have had to claim his luggage before getting another flight out. Indeed, for all the record shows, that is precisely what he was going to do. Finally, the regrettable fact that Puerto Rico is currently experiencing a serious crime problem is simply irrelevant to determining the scope of the protections afforded by the Fourth Amendment, see Almeida-Sanchez v. United States, supra, at 273.

confirms this analysis of Almeida-Sanchez, supra. See United States v. Ramsey, 431 U.S. 606 (1977).[8]

In fact, the "border search" cases, when properly understood, directly undermine the Commonwealth's arguments. The "border search" cases as a whole make clear that borders between sovereign countries are unique facts of international life, representing the precise point in space where American conceptions of freedom become jurisdictionally functional. On one side of the border, the American constitution applies. On the other side of the border, in the absence of official American government action,[9] it does not.

8/ The procedures followed by U.S. Customs Service officers at airports which serve both domestic and international travellers further illustrate the point. Even within the same airport (at New York's Kennedy Airport, for example) only persons entering the United States from foreign countries are subjected to Customs inspections. And as the majority of the Puerto Rican Supreme Court observed, "[W]hen traveling by plane there is no difference between going from here to Miami or from Miama [sic] to New York." Juris. Stat., App. A, at 21.

9/ See Reid v. Covert, 354 U.S. 1 (1957). Indeed, the holding in Reid, that American freedoms may sometimes be extended
(Footnote 9 continued on next page)

The relationship between the United States and Puerto Rico is not comparable to the relationship between the United States and a truly sovereign nation. With a few limited exceptions, see, e.g., Califano v. Torres, 435 U.S. 1 (1978), all American legal principles are as fully operative in Puerto Rico as in any of the fifty states. See Examining Bd., supra, and Calero-Toledo, supra.

Finally, the search authorized by P.R. Laws Ann. tit. 25, §1051 fails to meet the standards this Court has established for searches at true international borders. Although it has approved warrantless "stops for brief questioning" at fixed checkpoints at or near international borders, United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976), the Court has specifically held that "'any further detention . . . must be based on consent or probable cause.'" United States v. Martinez-Fuerte, supra at 567, quoting, United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975). A "roving patrol" near a

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(Footnote 9 continued)
extraterritorially, only emphasizes that they may not be compromised where American jurisdiction is unquestionable.

border must be able to point to "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" in order to conduct even a "modest" questioning stop. United States v. Brignoni-Ponce, supra, at 880-84. And in Almeida-Sanchez v. United States, supra, the Court ruled that roving border patrols are not excepted from the Fourth Amendment and are not permitted to conduct searches on the basis of their own "unfettered discretion." Almeida-Sanchez v. United States, supra, at 270.

But tit. 25, § 1051 of P.R. Laws Ann. establishes no fixed checkpoints, requires no finding of suspicion or probable cause, and authorizes highly intrusive searches by roving officers without requiring an initial stop for questioning. In the course of making its "intermediate border" argument, the Commonwealth concedes that the boundary between the United States and Puerto Rico is something less than an international border. Motion to Dismiss or Affirm, at 24. If this is so, then even by the Commonwealth's own argument a higher, rather than a lower, degree

of Fourth Amendment protection should be accorded persons entering Puerto Rico from the United States mainland than is accorded persons crossing an international boundary. The problem with the Commonwealth's argument is that P.R. Laws Ann. tit. 25, § 1051 does precisely the reverse.

The Commonwealth's claim that P.R. Laws Ann. tit. 25, § 1051 may be upheld as a proper exercise of its power to make reasonable administrative inspections in the interest of public health and safety is equally unpersuasive. First, the court below has authoritatively ruled that the challenged statute was enacted not for the purpose of protecting health or safety, but as a means of enforcing the Commonwealth's criminal laws. See Juris. Stat., App. A, at 13. This Court has ruled that it will not set aside the construction of a Puerto Rican statute by the Puerto Rico Supreme Court unless that construction is "inescapably wrong." Fornaris v. Ridge Tool Co., supra. Considering that the Statement of Motives of the Puerto Rican legislature which accompanied passage of this statute, quoted in Juris. Stat., App. A, at 40-41, explicitly states the legislature's concern with the Commonwealth's

growing crime problem, and that the statute is enforced by regular police officers, not administrative officials, no such showing can be made here. Moreover, even if the Commonwealth's health and safety inspection power could be invoked, P.R. Laws Ann. tit. 25, § 1051 would still be unconstitutional because it does not require a warrant or establish the "specific neutral criteria" on the basis of which an administrative search warrant must be issued. See Marshall v. Barlow's, Inc., supra, at 318; see also Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). 10/

10/ The military search cases cited by the Commonwealth also do not help its case. Although this Court has traditionally accorded the military considerable discretion to fashion its own criminal rules and procedures, see Parker v. Levy, 417 U.S. 733, 744 (1974), the U.S. Court of Military Appeals has repeatedly made clear its intention to require the strictest possible application of the Fourth Amendment to searches and seizures conducted pursuant to military authority. See, e.g., Courtney v. Williams, 24 U.S.C.M.A. 87, 89-90; 51 C.M.R. 261, 262-263, 1 M.J. 267, 270 (CMA 1976) ("The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule . . . . We believe that those procedures required by the Fourth Amendment in the civilian

(Footnote 10 continued on next page)

The only arguably analogous instance in which warrantless inspections are currently permitted, namely anti-skyjacking screenings at airport departure gates,[11] underscores the unreasonableness of the Puerto Rican procedure challenged here. Keyed to a highly specific danger of the gravest importance (the chance that firearms will be misused on a passenger airliner in mid-air), anti-skyjacking searches are conducted on the basis of articulable facts (visual screenings and individualized comparisons with the Federal Aviation Agency's scientifically developed skyjacker "profile"), and carried out in a graduated step-by-step progression from lesser to greater intrusions (from a visual screening, to an electronic magnetometer, to questioning, to physical searches).[12] In addition, warnings

(Footnote 10 continued)
community must also be required in the military community. We discern no considerations of military necessity that would require a different rule.") (citation omitted.)

11/ See United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

12/ See United States v. Doran, 482 F.2d 929 (9th Cir. 1973); United States v. Lopez, 328 F. Supp., 1077 (E.D.N.Y. 1971).
(Footnote 12 continued on next page)

concerning these intrusions are posted at a point where a would-be traveller could still make a meaningful choice to submit to the procedure or to leave the airport.[13] None of these conditions applies to this case.

(Footnote 12 continued)
These anti-skyjacking cases are, moreover, unique. Where less immediate threats to innocent lives are involved, the courts have repeatedly struck down procedures similar to these. See, e.g., United States v. Craemer, 555 F.2d 594 (6th Cir. 1977) (Drug Enforcement Administration's "drug courier profile").

13/ See, e.g., United States v. Doran, supra, at 930-31.

II. ARTICLE V, SECTION 4 OF THE CONSTITUTION OF PUERTO RICO, WHICH PREVENTED THE MAJORITY OF THE JUSTICES BEFORE WHOM APPELLANT ARGUED HIS STATE COURT APPEAL FROM ENTERING AN ORDER REVERSING HIS CONVICTION DESPITE THEIR OPINION THAT THE CONVICTION WAS UNCONSTITUTIONAL, VIOLATES THE SUPREMACY CLAUSE AND ABRIDGES APPELLANT'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS.

A. The Supremacy Clause

State and federal courts have an equal duty to enforce federal constitutional rights. In Article VI of the Constitution this doctrine is set forth in unequivocal terms:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (emphasis added)

In recent years this Court has repeatedly asserted the continuing vigor of this fundamental principle. See, e.g., Juidice v. Vail, 430 U.S. 327 (1977); Stone v. Powell, supra; Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Hoffman v. Pursue,

Ltd., 420 U.S. 592 (1975).[14] Yet a "Thing in the Constitution" of Puerto Rico, namely Article V, § 4, has prevented the vindication of appellant's federal constitutional rights. It has prevented the judges of the Puerto Rican Supreme Court from being "bound" by the Fourth Amendment.[15]

14/ The extreme importance of the Supremacy Clause, as the bedrock provision upon which the entire federal system ultimately rests, was clearly recognized by the Founding Fathers. Even prior to the Constitutional Convention James Madison wrote, "If the judges in the last resort depend on the States, and are bound by their oaths to them and not to the Union, the intention of the law and interests of the Union may be defeated by the obsequiousness of the tribunals to the policy or prejudices of the States." 2 J. Madison, Writings 339. Moreover, even the harshest contemporary critic of modern "judicial activism" acknowledges the singular importance of exacting strict fidelity to the commands of the Supremacy Clause. See R. Berger, Congress v. The Supreme Court, at 223-285. (1969).

15/ It has also caused the members of the court to violate their oaths of office. Article VI, § 16 of the Puerto Rican Constitution requires that "all public officials . . . shall take an oath to support the Constitution of the United States." The oath makes no exception for the Supremacy Clause or the Fourth

(Footnote 15 continued on next page)

Relying upon the Supremacy Clause, this Court has repeatedly set aside state procedures which impeded the enforcement of constitutional rights. Long before passage of the Fourteenth Amendment, which drastically altered the balance in federal-state relations in favor of the federal government, this Court relied upon the Supremacy Clause to ensure that federal rights would be enforced by state courts. Even in the antebellum heyday of the states' rights doctrine, this Court intervened dramatically to strike down "any state law" or state judicial procedure which "interrupt[ed], limit[ed], delay[ed],

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(Footnote 15 continued)
Amendment. Commentators have long noted the intimate connection between the Supremacy Clause and the clause relating to the oath of office. See 2 J. Madison, supra. R. Berger, supra.

The ironies and anomalies presented by this situation are numerous. Perhaps the greatest of them is that the most compelling and exhaustive legal argument for reversing appellant's conviction presently before this Court is to be found in the majority opinion of the court below. In this limited respect at least, this case, like Estate of Wilson v. Aiken Indus., cert. denied, 47 U.S.L.W. 3219 (Oct. 2, 1978), also recalls the well known remark by Charles Dickens as to what the law can sometimes be. Id. at 3219 n. 3.

or postpone[d]" the assertion of a "positive and absolute" constitutional right. See Prigg v. Pennsylvania, 41 U.S. 539, 611-12 (1842)(state kidnapping statute invalidated); Ableman v. Booth, 62 U.S. 506 (1859)(state habeas corpus process invalidated). Surely the values of privacy and liberty embodied in the Fourth Amendment are as worthy of this Court's protection as the "property" interests it invoked the Supremacy Clause to defend one hundred and thirty years ago on behalf of the fugitive slave clause.

Moreover, because this Court's decision in Stone v. Powell, supra, severely restricts a state defendant's right to have an independent federal determination of a Fourth Amendment claim, the Court should exercise particular care to ensure that a state court gives every appellant a full and fair opportunity to prevail on his Fourth Amendment claim. See Mincy v. Arizona, ___ U.S. ___, 57 L.Ed.2d 290, 306 (1978) (Marshall and Brennan, J.J., concurring).16/

16/ As the concurring justices observed, "It is far from clear that we would have

The Court's decision in Stone v. Powell presupposes parity between state and federal courts as forums for enforcing federal rights. Stone v. Powell, supra,

(Footnote 16 continued)
granted certiorari solely to resolve the Fifth Amendment issue in this case, for that could have been resolved on federal habeas corpus. With regard to the Fourth Amendment issue, however, we had little choice but to grant review, because our decision in Stone v. Powell precludes federal habeas consideration of such issues." Mincy v. Arizona, supra, at 306. Indeed, in the aftermath of Stone, at least one circuit court has suggested that a state defendant has a right to "meaningful appellate review" of his Fourth Amendment claim. See O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir.) 1976), cert. denied, 433 U.S. 911 (1977). See also, Gates v. Henderson, 568 F.2d 830, 843-4 (2d Cir. 1977), cert. denied, 98 S. Ct. 775 (1978)(Oakes, J. concurring). The net effect of Article V, § 4 and similar state provisions could well be a substantial increase in the number of Fourth Amendment cases this Court is required by law to adjudicate on the merits. See 28 U.S.C. §§ 1257(1), (2), 1258(1), (2).

at 493, n. 35. But Article V, § 4 of the Constitution of Puerto Rico operates as a direct and special presumption against the successful assertion of constitutional claims in a direct criminal appeal. When a rule of state appellate procedure unduly burdens the presentation of a Fourth Amendment claim on direct appeal, the arguments concerning relative institutional competence which supported the result in Stone v. Powell, supra, argue just as strongly that the state court rule must be set aside.[17/] Article V, § 4 of the

17/ See also Smyth v. Ames, 169 U.S. 466 (1898)(possible availability of an adequate state court remedy should not foreclose federal court consideration of a properly presented federal issue). Should the Court decide that Art. V, § 4 *is* a state rule denying appellant an "opportunity for full and fair litigation" of his Fourth Amendment claim, see Stone v. Powell, supra, at 494, without reaching the Fourth Amendment question, amicus urges the Court to make explicit in its decision that appellant's right to federal collateral attack on his conviction is not foreclosed.

Constitution of Puerto Rico clearly and unmistakably contradicts Stone v. Powell's fundamental premise, and it cannot be harmonized with that case.

B. Equal Protection and Due Process

In addition to obstructing the enforcement of federal rights in general, Article V, § 4 specifically deprives the criminal appellant challenging the constitutionality of his conviction in the Supreme Court of Puerto Rico of equal protection and due process.

Although a state has no obligation to afford a criminal defendant an opportunity to appeal his conviction at all, once an appeal is granted it must be made available on a fair and non-discriminatory basis. See, Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963). See also Ross v. Moffitt, 417 U.S. 600 (1974). Puerto Rican law provides the criminal defendant an appeal to the Commonwealth's Supreme Court, P.R. Laws Ann. tit. 4, § 37 (Supp. 1977), but Article V, § 4 of the Puerto Rican Constitution discriminates against certain criminal defendants in

two important ways.

First, it discriminates against appellants raising federal constitutional claims in a way which serves no rational state purpose. Under the current Puerto Rican procedure which permits the Puerto Rican Supreme Court to sit in three-man panels, see People v. Perez, supra, a mass murderer may win an appeal by a vote of two Supreme Court justices by successfully arguing, for example, a hearsay point. Meanwhile, appellant must serve a substantial prison sentence for a minor drug charge because his constitutional rights were violated by an unconstitutional statute and despite a majority opinion entered by four of the court's justices stating that his conviction should be reversed. In addition, Article V, §4 also discriminates among different constitutional claims. Had this search been conducted in the absence of statutory authorization, four votes would have sufficed to reverse appellant's conviction.

Second, Article V, §4 discriminates against appellants raising identical constitutional claims by arbitrarily increasing their individual burdens of persuasion depending upon the number of justices who happen to sit on a particular day. As noted above, Article V, §4 is superfluous when all

eight justices are sitting: general common law rules would require their majority vote on a constitutional case coming before them. See FTC v. Flothill Products, Inc., supra. But when only seven of them sit on a constitutional case, Article V, §4 makes it necessary for a criminal appellant to persuade 70% of the bench before him. When six justices sit, the appellant must persuade 83%. When five are sitting, he must persuade 100%. And when fewer than five appear, as People v. Perez, supra, permits, an appellant challenging the constitutionality of a Puerto Rican statute simply cannot win. A sliding-scale standard for successful appellate review, in which the scale slides upward depending upon factors over which the appellant has no control, is an "arbitrary and capricious" procedure.18/

18/ The fundamental unfairness of the appeal below is highlighted by considering how the Supreme Court of Puerto Rico came to be composed of eight justices in December 1977. The court had previously been composed of nine justices, but the Puerto Rican legislature decided in 1975 to decrease their number to seven through gradual attrition. See P.R. Laws Ann. tit. 4, §31 (Supp. 1977). Were this same issue to be decided in the future, when the court is comprised of the seven justices now contemplated, a vote of four would be sufficient to declare the statute unconstitutional. (Footnote 18 continued)

Article V, §4's sliding scale offends fundamental fairness in other ways as well. This Court has held repeatedly that questions concerning the burden of persuasion in criminal cases are matters of constitutional dimension. See In Re Winship, 397 U.S. 358, (1970); Mullaney v. Wilbur, 421 U.S. 684

(Footnote 18 continued)
Indeed, if the non-participating eighth justice had died just before appellant's case was heard, this conviction would have been reversed.

Originally, the Puerto Rican Supreme Court was composed of only five justices. See Article V, §2 of the Constitution of Puerto Rico. Thus, the votes of only three would then have reversed appellant's conviction. This Court, after an extensive review of the relevant social science literature on small group interaction, has recently ruled that a group of six is sufficient to guarantee adequate consideration of the questions the group must decide. See Ballew v. Georgia, 435 U.S. 223 (1978); Williams v. Florida, 399 U.S. 78 (1970). Appellant's appeal was decided by a group of seven.

(1975). And, however burdens of persuasion may be distributed between the prosecution and the defense as matters of law, in every other phase of a criminal proceeding the prosecutor and the defendant are evenly matched in terms of the number of persons they must each convince to win their point. On motions, they must each convince one judge. In most jurisdictions, they must each convince twelve jurors to convict or acquit. In states with a unanimous jury rule, either can hang a jury by convincing a single juror. And in states where non-unanimous jury rules apply, either side can obtain a final judgment on the same vote-count. But under Article V, §4 of the Constitution of Puerto Rico, and People v. Perez, supra, a prosecutor can sustain a conviction on appeal without convincing a single justice that the law underlying the conviction is constitutional. A defendant whose rights have been violated must convince five that it is not. Although there may be a legitimate state interest in constructing legal presumptions in favor of the constitutionality of duly enacted state legislation,19/ it is impermissible to enforce that interest by creating judicial

19/ [Please see next page for footnote]

mechanisms that operate in a manner which is fundamentally unfair.

For many years this Court also refused to decide major constitutional questions by a vote of fewer than a majority of the entire Court. See, e.g., Briscoe v. Commonwealth Bank of Kentucky, 33 U.S. 118 (1834). But that self-imposed rule has been disregarded for some twenty-four years. See, e.g., United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944); Feldman v. United States, 322 U.S. 487 (1944), reh. denied 323 U.S. 811 (1944). More importantly, even while the "Briscoe Doctrine" was in effect, the Court made sure that no abuses such as these would arise. Briscoe itself

19/ Commonwealth v. Aguayo, 83 P.R.R. 534 (1958), suggests that the Puerto Rican Constitutional Convention was concerned with the "presumption of constitutionality," as well as the problems of non-uniformity which might arise from the court's sitting in divisions, when it framed Article V, §4. See also People v. Perez, supra. On the other hand, Article V, §4 does not on its face create any presumption favoring the integrity of lower court judgments. Under Article V, §4, a party seeking to set aside a state statute must convince five justices of the Puerto Rican Supreme Court regardless of whether he won or lost below.

made an exception for "cases of absolute necessity." Briscoe v. Commonwealth Bank of Kentucky, supra at 122. And when a decision was not "absolutely necessary," the Court's solution was simple: if the entire Court could not be assembled, a case was simply put over until it could be. See, e.g., Graff, "The Charles River Bridge Case," in Quarrels That Shaped the Constitution 62, 71 (J. Garraty ed. 1966) (case put over for six years).

Virtually every state which has a rule resembling Article 5, §4 of the Puerto Rican Constitution has also created a special procedural or remedial device to prevent the situation presently before the Court from arising.[20/] Puerto Rico has made none. When an injustice occurs, it simply allows that

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20/ See, e.g., North Dakota Constitution, Article 4, §95 (requiring the state Supreme Court's chief justice to appoint another judge, or a retired justice, to replace any justice who is unable to hear a particular case); Nebraska (local practice requirement that "Notice of Constitutional Issue" be filed in advance with the Chief Clerk of the Supreme Court so that the court will sit en banc); Colorado (informal requirement that the Supreme Court sit en banc to decide a constitutional issue).
(Footnote 20 continued)

injustice to stand. This cannot be the law.

(Footnote 20 continued)

Nor should the Court's holding in Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74 (1930) govern here. That case, decided almost half a century ago, was a civil case concerning the power of the states to organize their own political subdivisions. The Court's opinion was brief. The enormous changes in due process doctrine since 1930, combined with the fact that this is a criminal case, render Ohio ex rel. Bryant, supra, inapplicable. In addition, the people of Ohio voted ten years ago to repeal the provision of the Ohio Constitution this Court upheld in that case.

CONCLUSION

The Judgment entered below should be reversed.

Respectfully submitted,

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